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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-507

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

APPENDIX.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES.

Date	Proceedings
3/5/71	Ent ord & Fld Ind; Bond fixed at $1,000. P/S each Deft; Ent ord for iss of summons Each Deft; Issd summons to Mars.
3-9-71	Fld $1,000 P/S bond for each of the 4 defts posted 3-9-71. Bail Review—ent ord set at $1,-000 P/S each.

Date	Proceedings
	Defts arr. Ent ord set for O.H. for 4-15-71 at 2 pm. Wm. Hamling, representing all corps, arr. for corps. (HARRIS).
3-12-71	#1-2-3-4—Fld Waiver of Deft's presence.
3-16-71	All—Fld summons ret exec.
3-24-71	#2—Bail Review—Ent ord conditions of bond to be as those set forth in letter of Warren Reese, dated 3-22-71, fld 3-24-71. (Harris)
4-15-71	O.H. All—O.H. waived. Ent ord trans to Judge Thompson for jury trial settg & mots 4-26-71 at 8:30 am. (MCCUE)
4-26-71	All—Arr T/N and plea Not Guilty. (each deft & all corps). Ent ord Trial call 10-13-71 at 9:30 am. cont to 9-8-71 at 9:30 am for mots. (GT).
4-17-71	All—Fld ord modifying bail conditions (GT) (Mld cys).
8-13-71	All—Fld Brief in suppt of mot to dismiss Indictment; mot to dismiss the Indictment pursuant to Rule 12; mot for a B/P; Memo of P/A in suppt of mot for a B/P; mot for discovery and inspection; Memo of P/A in suppt of mot for discovery and inspection; mot for the inspection of the Grand Jury minutes or, alternatively, for particulars as to what evidence was presented to the Grand Jury; Memo of P/A in suppt of mot for the inspection of Grand Jury Minutes, or, alternatively, for particulars as to what evidence was presented to the Grand Jury; Affid of Stanley Fleishman in suppt of mot for the inspection of

Date	Proceedings

Grand Jury Minutes or, alternatively, for particulars as to what evidence was presented to the Grand Jury.

8-20-71 Fld mot for extension of time for filing response to defts' mots, affid of Warren P. Reese; fld ord thereon granting mot. (GT).

8-27-71 Fld memo in response to defts' mot for discovery & inspection; fld memo in opp to defts' mot for inspection of Grand Jury minutes; fld memo in opp to defts' mot for B/P; fld memo in opp to defts' mot to dismiss indictment.

9-7-71 Fld defts' reply memo to Govt's opp to mot for inspection of Grand Jury minutes; fld defts' reply to opp to mot for discovery & inspection; fld defts' reply memo to Govt's opp to mot for B/P; fld defts' reply memo to Govt's opp to mot to dismiss indictment.

9-8-71 #5—Arr T/N & Plea NG. Fld affid in support of mot to dismiss. (GT).

9-8-71 #1, 2, 3, 4, 5, 6, 7—Ent ord hrg mots cont to 9-9-71 @ 2 pm. (GT).

9-9-71 #1, 2, 3, 4, 5, 6, 7—Hearing motion to dismiss, for discovery, for grand jury minutes and bor B/P Ent ord SUBMITTED. Ent ord set for P/T for 10-6-71, 1:30 P.M. (GT).

9-16-71 Fld supp memo in response to item 1 of defts motion for discovery.

9-21-71 Fld ord deny motion to dismiss, deny mot for B/P, grant mot for discovery, deny motion for inspection of grand jury minutes. (GT). Mld cys.

Date	Proceedings
9-22-71	Fld stip and ord thereon to file docs attached as true reproductions. (GT).
10-5-71	Fld defts' req for Court to take judicial notice. Fld mot to determine whether book referred to in cts 19, 20 & 21 of indictmt & advertisement referred to in cts 2 through 14 of indictment are protected by free speech and press provisions of First Amendmt & therefore cannot be found obscene.
10-7-71	Fld ord to clk to allow the attys for deft's & investigators to review list & questionnaires of the trial jury panel venire that will be chosen trial on or about 10-13-71 and to allow attys to make cys of the jury questionnaires at times and places convenient to the Clk of the CT. (GT).
10-6-71	Ent ord pre trial hrg held. Ord exhibits marked. Fld plaintiff's exhibit list.
10-7-71	Fld memorandum brief on relevance of publications receiving snd class mailing privilege and/or copyright. Fld memor brief on admissibility of other publications. Fld govt's trial brief & affid of serv by mail.
10-8-71	ALL—Fld request for additional jury challenges.
10-12-71	ALL—Fld not of mot to challenge jury & strike venire. Fld mot, Fld memo of pts & authorities in support. NOTICED for 10-13-71 @ 9 am (GT).
10-12-71	# 3 & 4—Fld mot for sever of trial. Fld affid in support. Fld suppl quest proposed by defts. (GT).

Date	Proceedings

10-12-71 ALL—Fld supple Questions proposed by plaintiff to jurors on voir dire w/affid of service by mail ( ).

10-12-71 ALL—Fld not of mot to challenge jury panel & to strike venire. Fld mot to strike. Fld memo of pts & authorities in support.

10-8-71 ALL—Fld ord grant add jury challenges. Fld ord re: defts mots. Mld

10-13-71 ALL—Fld deft's proposed jury instructions; memor re reading of alleged obscene matter to jury and appropriate time to submit such matter to jury; memor re pandering; memor brief regarding trial procedure; affid of Stanley Fleishman in support of challenge to trial jury.

10-13-71 ALL—HRG MOT—Swore wits. Ent ord mot to have grand jury transcript included in record denied. Ord mot that grand jury indict was improperly returned denied. Ord all mots considered renewed & denied. Ord mot to dism denied. Ord mot to require govt to elect denied; mot to disclose names of govt wits denied; mot to disclose names of all persons contacted by govt as poss wits denied; mot to disclose names of all persons contacted as poss govt wits who gave evid or statements favorable to deft's granted; mot to sever cases denied; mot to sever deft's Thomas & Wright denied; mot to challenge jury panel denied; mot for continuance denied. (GT).

10-8-71 ALL—Fld ord granting additional jury challenges. Fld ord re: defts mots. Fld ord re: defts' mots. (GT).

Date	Proceedings
10-13-71	JURY TRIAL (ALL) FIRST DAY. Jury sworn voir dire & questioned. Premarked Govt exhibits. Fld Govt's requested jury instructions. Fld. supplemental voir dire questions by deft. Ent ord cont to 10-14-71 9:
10-14-71	ALL—JURY TRIAL 2ND DAY. Additional panel sworn voir dire and questioned. Jury impaneled & sworn. Fld Govt's supplemental response to deft's mot for discovery. Ent ord cont to 10-15-71 @ 9:30 am. (GT).
10-15-71	ALL—JURY TRIAL 3RD DAY. Deft's exhibits pre-marked. Swore wits & fld exhibits. Ent ord cont to 10-19-71 @ 9:30 am. (GT).
10-26-71	Fld mot for discovery & inspection & affid of personal serv & affid of serv by mail.
10-19-71	ALL—JURY TRIAL 4TH DAY—Swore wits & fld exhibits. Defense moves for mistrial—taken under submission. (GT).
10-20-71	ALL—JURY TRIAL 5TH DAY—Swore wits & fld exhibits. Mot for mistrial—denied. (GT).
10-21-71	ALL—JURY TRIAL 6TH DAY—Swore wits & fld exhibits. (GT).
10-22-71	ALL—JURY TRIAL 7TH DAY—Swore wits & fld exhibits. (GT).
10-27-71	ALL—JURY TRIAL 8TH DAY—Swore wits & fld exhibits. (GT).
10-28-71	ALL—JURY TRIAL 9TH DAY—Swore wits & fld exhibits. (GT).

Date	Proceedings

10-29-71 ALL—JURY TRIAL 10TH DAY—Swore wits & fld exhibits. Fld opposition to mot for discovery & inspection. (GT).

11-2-71 ALL—JURY TRIAL 11TH DAY—Swore wits & fld exhibits. (GT).

11-3-71 ALL—JURY TRIAL 12TH DAY—Swore wits & fld exhibits. (GT).

11-4-71 ALL—JURY TRIAL 13th DAY—Swore wits & fld exhibits. (GT)

11-5-71 ALL—JURY TRIAL 14TH DAY—Ent ord deft's mot for mistrial denied. Swore wits & fld exhibits. (GT)

11-9-71 ALL—JURY TRIAL 15TH DAY—Swore wits & fld exhibits. (GT)

11-10-71 ALL—JURY TRIAL 16TH DAY—Ent ord mot for mistrial denied. Swore wits & fld exhibits. (GT)

11-11-71 ALL—JURY TRIAL 17TH DAY—Ent ord mot for mistrial denied. Ent ord mot for J/A taken under submission. Fld exhibits. Ent ord *Govt mot to dismiss counts 6, 14, 18 & 20 granted.* Fld request for Court to take judicial notice. (GT)

11-16-71 ALL—JURY TRIAL 18TH DAY—Ent ord mot for J/A denied. Ent ord Govt mot for discovery denied. Swore wits & fld exhibits. (GT)

11-17-71 ALL—HRG MOTS—Ent ord hrg requisite to flg c.c. of judgmt of USCA denying petition for writ of mandamus and prohibition to be fld. (GT) Fld c.c. of judgmt of USCA denying petition for writ of mandamus and prohibition. (Ent 11-18-71)

Date Proceedings

11-17-71 ALL—JURY TRIAL 19TH DAY—Govt requests TRO to prevent Greenleaf, W. L. Hamling & RGL advertising from advertising a new publication on radio & TV—mot taken under submission. Swore wits & fld exhibits. (GT)

11-19-71 ALL—JURY TRIAL 20TH DAY—Swore wits. (GT)

11-23-71 ALL—JURY TRIAL 21ST DAY—Swore wits & fld exhibits. (GT)

11-24-71 ALL—JURY TRIAL 22ND DAY—Swore wits & fld exhibits. Ent ord mot for mistrial denied. (GT)

11-30-71 ALL—JURY TRIAL 23RD DAY—Swore wits & fld exhibits. Fld Govt's revised proposed jury instructions. (GT)

12-1-71 ALL—JURY TRIAL 24TH DAY—Swore wits. (GT)

12-6-71 Fld deft's objections to Govt's requested jury instructions.

12-7-71 ALL—JURY TRIAL 25TH DAY. Swore wits. (GT)

12-8-71 ALL—JURY TRIAL 26TH DAY. Fld exhibits. Ent ord mot for mistrial denied. (GT)

12-9-71 ALL—JURY TRIAL 27TH DAY. Ent ord mot for mistrial denied. (GT)

12-10-71 ALL—JURY TRIAL 28TH DAY. (GT)

12-14-71 ALL—JURY TRIAL 29TH DAY. (GT)

12-15-71 ALL—JURY TRIAL 30TH DAY. (GT)

Date Proceedings

12-16-71 ALL—JURY TRIAL 31ST DAY. Jury retires to deliberate. (GT)

12-17-71 ALL—JURY TRIAL 32ND DAY. Jury continues deliberations. (GT)

12-20-71 ALL—JURY TRIAL 33RD DAY. Jury continues deliberations. Re-read jury instructions regarding law on obscenity. (GT)

12-21-71 ALL—JURY TRIAL 34TH DAY. Jury continues deliberations. (GT)

12-22-71 ALL—JURY TRIAL 35TH DAY. Jury continues deliberations. re-read certain jury instructions. (GT)

12-23-71 ALL—JURY TRIAL 36TH DAY. Fld Govt's requested additional jury instructions—denied. Fld & ent. verdicts:

#1 (HAMLING) *GUILTY* Cts. 1,2,3,4,5,7,8, 9,10,11,12, & 13

#2 (KEMP) *GUILTY* Cts 1,2,3,4,5,7,8,9,10,11, 12, & 13

#3 (WRIGHT) *GUILTY* Cts 1,2,3,4,5,7,8,9,10, 11,12, & 13

#4 (THOMAS) *GUILTY* Cts 1,2,3,4,5,7,8,9, 10,11,12, & 13

#5 (GREENLEAF CLASSICS INC.) *NOT GUILTY* Cts 1,2,3,4,5,7,8,9,10,11,12, & 13

#6 (REED ENTERPRISES INC.) *GUILTY* Cts 1,2,3,4,5,7,8,9,10,11,12 & 13

#7 (LIBRARY SERVICE INC.) *GUILTY* Cts 1,2,3,4,5,7,8,9,10,11,12 & 13.*

*#1, 2, 3, 4, 6, & 7—Jury polled.

Date	Proceedings
	ALL—Ent ord *mistrial declared as to Cts 15, 16, 17, 19 & 21* Ent ord trial call 3-1-72 at 9:30 & cont to 1-21-72 at 2 pm for hrg mots. #1,2,3,4,6 & 7—Ent ord cont to 2Z7Z72 1:30 for hrg rept P/O & Sent. (GT)
1-11-72	ALL—Fld mot in arrest of judgmt made purs rule 34 t/w affid of serv; fld brief in support of mot in arrest of judgmt t/w affid of serv; fld mot for a new trial made purs to rule 33 t/w affid of serv; fld brief in support of mot for new trial t/w affid of serv; fld mot for judgmt of acquittal made purs rule 29(c) t/w affid of serv; fld brief in support of mot for judgmt of acquittal t/w affid of serv by mail. Fld brief in support of mot for judgmt of acquittal after discharge of jury, made purs to rule 29(c), t/w affid of serv by mail.
1-10-72	#4—Ent ord hrg mot to modif bond—bond modif to allow deft to travel to Mexico. (GT)
1-18-72	Fld suppl brief in support of mot for judgmt of acquittal & in the alternative mot for new trial & in arrest of judgmt t/w affid of serv. Fld affid of Shirley Wright; fld affid of Earl Kemp; Fld affid of David Thomas
1-20-72	#2,3,4—Fld not of mot & mot to strike affids & ord shortening time. Noticed for 1-28-72 @ 10am. W/ord thereon. (GT)
1-21-72	#1,2,3,4,6&7—Ent ord cont to 1-28-72 @ 10 am for hrg mots. (GT) Fld govt's consolidated memor in opposition to defts' various post trial mots t/w affid of serv by mail.

Date Proceedings

1-24-72 ALL—Fld mot re request for CT ord & instructions to jury; fld affid of Louis S. Katz re request for CT ord & instructions to jury. T/W affid of serv by mail.

1-28-72 HRG MOTS—Ent ord mot for arrest of judgmt denied; ord mot for new trial denied; ord mot for J/A denied; ord govt's mot to strike defts' affid granted. (GT)

Fld govt's memor in opposition to defts' mot re request for CT ord & instructions to jury.

2-7-72 #1—Ent ord comm to cust AG for 1 yr on ct 1, Cts 2-5 & 7-13 AG for 3 yrs, ea ct conc but consec w/ct 1. Ord fine cumulative; ct 1 $10,000, cts 2-5 & 7-13 $2,000 ea ct. TOTAL FINE $32,000 to be paid. Ord mot for stay denied. Ord bond on appeal set at $15,000 C/S, ord deft released on O/R until 5pm on 2-8-72. (GT) fld judgmt iss cys (Ent 2-8-72)

#2—Ent ord comm to cust AG on ct 1 for 1 yr & 1 day under 18:4208(a). Cts 2-5 & 7-13 AG for 2 yrs ea ct conc but consec w/ct 1. Ord mot for stay denied, ord bond on appeal set at $10,000 C/S, ord deft released on O/R until 2-8-72 @ 5pm. (GT) fld judgmt iss cys (Ent 2-8-72)

#3—Ent ord comm to cust AG for 6 mos on ct 1, E.S.S. & 2 yrs prob w/super. Cts 2-5 & 7-13 AG for 1 yr ea ct conc. but consec w/ct 1; E.S.S. & 3 yrs prob w/super; prob consec w/ct 1. (CW) fld judgmt iss cys (Ent 2-8-72)

#4—Ent ord comm to cust AG for 6 mos impr on ct 1; E.S.S. & 2 yrs prob w/super. Cts 2-5 & 7-13 AG 1 yr ea ct conc but consec w/ct 1; E.S.S.

Date	Proceedings
	& 3 yrs prob; prob consec w/ct 1. (CW) fld judgmnt iss cys (Ent 2-8-72)
	#6—Ent ord ct 1 fine $10,000. Cts 2-5 & 7-13 fine $3,000 ea ct. Fine cumulative. TOTAL FINE $43,000 to be paid. (CW) fld judgmt iss cys (Ent 2-8-72)
	#7—Ent ord ct 1 fine $1,000. Cts 2-5 & 7-13 fine $1,000 ea ct. Fine cumulative. TOTAL FINE $12,000 to be paid. (CW) fld judgmt iss cys (Ent 2-8-72)
	ALL—Ent ord all bonds exon.
2-7-72	Fld affid of Stanley Fleishman in support of petn's application for bail pending appeal; fld affid of William L. Hamling.
	#1—Fld NOTICE OF APPEAL; atty certification; designation of record on appeal
	#2—Fld NOTICE OF APPEAL; atty certif; design of record;
2-8-72	#1—Fld $15,000 cash bail bond on appeal posted 2-8-72. (GT)
	#2—Fld $10,000 cash bail bond on appeal posted 2-8-72. (GT)
	Issd abstract of order to marshal on deft #1&2.
2-11-72	#3,4,6&7—Fld NOTICES OF APPEAL; designation of record on appeal; and
3-1-72	#3&4—Ent ord bail on appeal set at $1,000 P/S.
	#2—Ent ord bond modif to allow deft to travel to Guadalahara.
	ALL—Ent ord trial call for 11-7-72 @ 9:30 am. (GT)

Date	Proceedings
3-2-72	ALL—Fld stipulation w/ord thereon that retrial for all defts on cts 15-17 and 21 may be scheduled to commence on 11-7-72 @ 9:30 am; and that #3&4's bail on appeal is set for $1,000 P/S on each. (GT)
3-2-72	#3—Fld $1,000 bail bond on appeal w/ approval. (GT) Dated 3-1-72. #4—Fld $1,000 bail bond on appeal w/approval. (GT) Dated 3-1-72.
3-15-72	#1—Fld ord that deft may leave US to travel to Nassau in the Bahamas for period of 7 days to return not later than 4-24-72. (GT)
4-24-72	Fld orig & 3 cys of reptr's trans in 33 vol & vol a thru e. (FRANDEL)
5-1-72	Fld ord nunc pro tunc & extension of time in which to file & docket appeal record w/ord thereon to & including 4-24-72. (GT)
5-11-72	1-6 Mld. Clerk's w/tran to USCA

INDICTMENT.

Filed: March 5, 1971.

The Grand Jury charges that:

COUNT 1

(Title 18, U.S.C., Section 371)

From on or about September 11, 1969, and continuously thereafter up to and including the date of the filing of this indictment, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did in the Southern District of California and elsewhere willfully and knowingly conspire, combine, collaborate and agree together and with each other and with London Press, Inc., North Hollywood, California, Robert Reitman, Paul Wisner and Bernard Lieberman, doing business as Regent House, North Hollywood, California, and Richard Harte and Venita Harte, doing business as Academy Addressing & Mailing Service, North Hollywood, California, named herein as unindicted co-conspirators, and with diverse other persons whose names are to the Grand Jury unknown, to violate certain laws of the United States, to wit, Section 1461, Title 18, United States Code, all in violation of Section 371, Title 18, United States Code.

It was a part of the said conspiracy that the defendants would knowingly use the United States mails for the mailing and carriage in the mails, and knowingly cause to be delivered by mail, certain non-mailable matter, to wit, obscene advertisements, obscene books, and advertisements giving information as to where, how, from whom, and by what means said obscene books might be obtained.

OVERT ACTS

At the times hereinafter mentioned, the defendants and the unindicted co-conspirators hereinbefore named, committed the following overt acts among others in furtherance of said conspiracy and to effect the objects thereof:

1. On or about September 11, 1969, in the county of San Diego in the state of California, defendants DAVID L. THOMAS and LIBRARY SERVICE, INC. filed a Municipal License Application with the city of San Diego.

2. On or about September 17, 1969, in the county of San Diego in the state of California, defendants DAVID L. THOMAS and LIBRARY SERVICE, INC., made application for a postage meter license #2431.

3. On or about November 13, 1969, defendants WILLIAM L. HAMLING and REED ENTERPRISES, INC., filed with the Bank of America, University-Highland Branch, 4444 University Avenue, San Diego, California, an authorized signature card for account number 2082-00004.

4. On or about August 20, 1970, defendants SHIRLEY R. WRIGHT and GREENLEAF

CLASSICS, INC., filed with the Bank of America, University-Highland Branch, 4444 University Avenue, San Diego, California, an authorized signature card for account #2086-00007.

5. On or about October 7, 1970, defendants EARL KEMP and LIBRARY SERVICE, INC., filed with postal authorities an application for Post Office Box 20308 at the Grantville Station, San Diego, California.

6. On or about December 7, 1970, unindicted co-conspirator London Press, Inc., North Hollywood, California, billed defendant REED ENTERPRISES, INC., for "80,000 COMMISSION REPORT MAILER (Library Service)", Job number 5495.

7. On or about December 11, 1970, unindicted co-conspirator London Press, Inc., North Hollywood, California, billed defendant GREENLEAF CLASSICS, INC., for 52,249 books in the amount of $86,558.64.

8. On or about January 11, 1971, unindicted co-conspirator Paul Wisner, doing business as Regent House, North Hollywood, California, signed a check payable to the "U.S. Postmaster" in the amount of $3,300.00.

9. On or about January 12, 1971, Richard Harte and Venita Harte, doing business as Academy Addressing & Mailing, North Hollywood, California, labeled, stuffed, and affixed postage to 55,752 envelopes containing advertising matter for defendant LIBRARY SERVICE, INC.

COUNT 2

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 12, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to W. Reiniger, P. O. Box 194, Orange City, Iowa, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 3

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California

corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 12, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to C. Hazlett, 1715 Hillcrest Drive, Mason City, Iowa, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 4

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 12, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to J. Lynch, 5700 N. Waterbury Rd., Des Moines, Iowa, and did knowingly cause to be delivered by mail according to the di-

rection thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 5

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 12, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to D. Lindell, 521 Woodland Avenue, Fairmont, Minnesota, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 6

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corpora-

tion formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to H. Isenberg, 887 Farmington Avenue, W. Hartford, Connecticut, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 7

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did

knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to E. James, 1109 Herr Street, Pittsburgh, Pennsylvania, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 8
(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to W. Dammann, 31 North 7th Street, W. Terre Haute, In-

diana, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 9

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to David Snell, 413 Jerome Avenue, Bristol, Connecticut, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 10

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP,

SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to Alfred Meyerhoff, 605 Gregory Drive, Greensburg, Pennsylvania, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 11

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and car-

riage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to Allen Crapo, Oxford Center, Oxford, Connecticut, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 12

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to A. Kenneth Sivitz, 5436 Bartlett Street, Pittsburgh, Pennsylvania, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 13

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to Victor LaMari, Powder Mill Road, Southwick, Massachusetts, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 14

(18 U.S.C. 2 and 1461)

On or about January 19, 1971, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as

LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC. did knowingly use, and cause the use of, the mails for the mailing and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from San Diego in the Southern District of California to Shin Tamanha, 1116 Koko Head Avenue, Honolulu, in the District of Hawaii, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 15

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails from North Hollywood, California, to Chester H. Pribble, Woolrich, Pennsylvania, a certain envelope containing a printed advertisement giving information where, how, from whom, and by what means an obscene, lewd, lascivious, indecent, filthy and vile book entitled "The Illustrated Presidential Report of

the Commission on Obscenity and Pornography" might be obtained, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 16

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails from North Hollywood, to Morris Mendelsohn, 358 Princeton Drive, Pittsburgh, Pennsylvania, a certain envelope containing a printed advertisement giving information where, how, from whom, and by what means an obscene, lewd, lascivious, indecent, filthy and vile book entitled "The Illustrated Presidential Report of the Commission on Obscenity and Pornography" might be obtained, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 17

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails from North Hollywood, California, to R. Reinke, 433 South 21 Street, Richmond, Indiana, a certain envelope containing a printed advertisement giving information where, how, from whom, and by what means an obscene, lewd, lascivious, indecent, filthy and vile book entitled "The Illustrated Presidential Report of the Commission on Obscenity and Pornography" might be obtained, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 18

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS,

GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails from North Hollywood, California, to C. Marguet, Jr., 601 East 10 Street, New Albany, Indiana, a certain envelope containing a printed advertisement giving information where, how, from whom, and by what means an obscene, lewd, lascivious, indecent, filthy and vile book entitled "The Illustrated Presidential Report of the Commission on Obscenity and Pornography" might be obtained, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 19

(18 U.S.C. 2 and 1461)

On or about February 11, 1971, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did

knowingly use the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain package containing an obscene, lewd, lascivious, indecent, filthy and vile book entitled, "The Illustrated Presidential Report of the Commission on Obscenity and Pornography" from San Diego, California, to Harry Bakker, P. O. Box 26015, Lawrence, Indiana, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 20

(18 U.S.C. 2 and 1461)

On or about February 12, 1971, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, Inc., did knowingly use the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain package containing an obscene, lewd, lascivious, indecent, filthy and vile book entitled, "The Illustrated Presidential Report of the Commission on Obscenity and Pornography" from San Diego, California, to S. Morris, P. O. Box 46, Tarzana, California, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 21

(18 U.S.C. 2 and 1461)

On or about February 17, 1971, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain package containing an obscene, lewd, lascivious, indecent, filthy and vile book entitled, "The Illustrated Presidential Report of the Commission on Obscenity and Pornography" from San Diego, California, to William H. Rogers, P. O. Box 25, Boston, Massachusetts, all in violation of Sections 2 and 1461, Title 18, United States Code.

A TRUE BILL:
/s/ H. Albert Wallace
Foreman

/s/ Harry D. Steward
HARRY D. STEWARD
United States Attorney

MOTION TO DISMISS INDICTMENT.

Filed: .....

COME NOW the Defendants, WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation, formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISERS, INC., a California corporation, formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation, also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., and move this Court for an Order dismissing the Indictment herein, and each and every count thereof, on the following grounds:

1. The Indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense against the United States.

2. No facts sufficient to constitute an offense against the United States were presented to the Grand Jury which returned each count of the Indictment herein.

3. The Indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense against the United States because the Indictment failed to allege the essential elements of obscenity.

4. Counts 2-18, inclusive, of the Indictment fail to state facts sufficient to constitute an offense under 18 U.S.C. §1461 because the advertisements are regulated exclusively by 39 U.S.C. §3008, which section deals with advertisements which are allegedly pandering.

5. The Indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense against the United States because:

(a) The advertisements referred to in Counts 2-14, inclusive, of the Indictment are, as a matter of law, not obscene, because:

(i) The book "The Illustrated Presidential Report of the Commission on Obscenity and Pornography", referred to in Counts 19-21, inclusive, of the Indictment, is clearly protected by the free speech and press provisions of the First Amendment and, as a matter of law, is not obscene.

(b) The advertisements referred to in Counts 2-14, inclusive, of the Indictment, are as a matter of law not obscene, but on the contrary are protected by the free speech and press provisions of the First Amendment to the United States Constitution.

(c) The advertisements referred to in Counts 15-18, inclusive, of the Indictment give information as to where, how, from whom and by what means a book, protected by the free speech and press provisions of the First Amendment might be obtained. The advertisements referred to in said counts do not give information where, etc., an obscene book might be obtained.

(d) Since the book, referred to in Counts 19-21, inclusive, of the Indictment are protected by the free speech and press provisions of the First Amendment, and the advertisements referred to in Counts 2-18, inclusive, of the Indictment are similarly protected, it follows that a "conspiracy" to mail the constitutionally protected book and advertisements does not constitute an offense against the United States.

6. The Indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense against the United States because 18 U.S.C. §1461, on its face and as construed and applied, violates the free speech, due process and equal protection provisions of the First, Fifth and Sixth Amendments, and the cruel and unusual punishment provisions of the Eighth Amendment, and the right of the People preserved by the Ninth and Tenth Amendments to the United States Constitution.

The Motion is based upon the Indictment herein and all the papers and records on file, including defendants' Brief in support of said Motion to Dismiss the Indictment, and is made pursuant to Rule 12 of the Federal Rules of Criminal Procedure.

STANLEY FLEISHMAN, INC. and
GOSTIN & KATZ
/s/ By Stanley Fleishman
STANLEY FLEISHMAN
Attorney for Defendants

MOTION FOR BILL OF PARTICULARS.

Filed: .....

COME NOW the defendants, and move this Court for an Order directing the plaintiff to furnish and file a Bill of Particulars to the Indictment, and each and every count thereof, in the following respects:

1. State whether the terms "obscene," "lewd," "indecent," "lascivious," "filthy" and "vile" used in Counts 2-21 of the Indictment are intended to have the same meaning. If the terms have different meanings, state the meaning of each such term.

2. If the said terms are all intended to have the same meaning, to wit, "obscene," state the essential elements of that term.

3. State whether it is claimed that the advertisements named in Counts 2-14 of the Indictment are utterly without redeeming social value.

(a) State whether any evidence was presented to the Grand Jury to this effect.

(b) State the name of the person or persons so testifying.

4. State whether it is claimed that the book offered for sale in the advertisements in Counts 2-14 of the Indictment is utterly without redeeming social value.

(a) State whether any evidence was presented to the Grand Jury to this effect.

(b) State the name of the person or persons so testifying.

5. State whether it is claimed that the book named in Counts 19-21 of the Indictment appeals to the prurient interest of the average person in the Nation as a whole.

(a) State whether any evidence was presented to the Grand Jury to this effect.

(b) State the name of the person or persons so testifying.

6. State whether it is claimed that the advertisements named in Counts 2-14 of the Indictment appeal to the prurient interest of the average person in the Nation as a whole.

(a) State whether any evidence was presented to the Grand Jury to this effect.

(b) State the name of the person or persons so testifying.

7. State whether it is claimed that the advertisements named in Counts 15-18 of the Indictment are non-mailable, assuming that the book "The Illustrated Presidential Report of the Commission on Obscenity and Pornography" is not obscene.

(a) State whether any evidence was presented to the Grand Jury to this effect.

(b) State the name of the person or persons so testifying.

8. State whether it is claimed that the advertisements named in Counts 2-18 of the Indictment go substantially beyond customary limits of candor in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion.

(a) State whether any evidence was presented to the Grand Jury to this effect.

(b) State the name of the person or persons so testifying.

9. State whether it is claimed that the book named in Counts 19-21 of the Indictment go substantially

beyond customary limits of candor in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion.

(a) State whether any evidence was presented to the Grand Jury to this effect.

(b) State the name of the person or persons so testifying.

10. State whether it is claimed that each of the defendants knew that the advertisements named in Counts 2-14 of the Indictment and the book named in Counts 19-21 of the Indictment:

(a) Went substantially beyond customary limits of candor in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion; and

(b) Appealed to the prurient interest of the average person in the Nation as a whole; and

(c) Were utterly without redeeming social value.

(i) State whether any evidence was presented to the Grand Jury to this effect.

(ii) State the name of the person or persons so testifying.

11. State whether the persons named as addressees in each count of the Indictment are real or fictitious. If the names are fictitious, set forth the real names of the said persons.

12. State whether the persons named as addressees in each count of the Indictment are postal inspectors or other employees of the Federal Government, whether using their real names or using a fictitious name.

13. Set forth and produce the specific envelopes, books and advertisements contained in each count of the Indictment.

The aforesaid Motion is made upon the grounds that the said Particulars are required by the defendants in order to make adequate preparation for their defense; to avoid prejudicial surprise at the trial; to protect defendants against a second prosecution for the same offense, and upon the further grounds that a failure to grant the aforesaid Particulars will deprive the defendants of their defenses to the charges contained in the Indictment; arbitrarily compel them to stand trial thereunder, and arbitrarily deprive defendants of a fair trial without due process of law, in violation of the due process provision of the Fifth Amendment to the United States Constitution and the rights guaranteed to them by the Sixth Amendment to the United States Constitution to be informed of the nature and cause of the accusation made against defendants.

This Motion will be based upon Rule 7(f) of the Federal Rules of Criminal Procedure, the pertinent provisions of the Fifth and Sixth Amendments to the Constitution of the United States, the Brief in support of the Motion, the Indictment, and all the papers and proceedings heretofore had herein.

DATED: August 11, 1971.

STANLEY FLEISHMAN, INC. and
GOSTIN & KATZ
/s/ By Stanley Fleishman
STANLEY FLEISHMAN
Attorneys for Defendants

MOTION FOR INSPECTION OF GRAND JURY MINUTES.

FILED: .....

DEFENDANTS MOVE THE COURT for an Order permitting the defendants to inspect the Minutes of the Grand Jury, pursuant to Rules 6 and 16(b) of the Federal Rules of Criminal Procedure.

The aforesaid Motion is made upon the grounds that the said inspection of the Grand Jury Minutes is required by the said defendants in the interests of justice, because the inspection of the proceedings before the Grand Jury is reasonably required and is material to the preparation of the defense of defendants; because inspection of the Grand Jury Minutes will enable the Court to determine substantial legal and constitutional questions raised by the Motions of the defendants to dismiss the Indictment which should be determined by the Court prior to trial; because denial of the inspection of the Grand Jury Minutes would arbitrarily deprive defendants of a fair trial and their liberty without due process of law, contrary to the due process and fair trial provisions of the Fifth and Sixth Amendments to the Constitution; and because due and timely inspection of the Grand Jury Minutes is necessary in order to prevent the suppression of constitutionally protected material and to guarantee the public's access to such constitutionally protected material under the First Amendment.

In the event that the Minutes were not transcribed, defendants request the Court to order the Government to state, in writing:

1. Whether any evidence was presented to the Grand Jury that the material charged in the Indictment was utterly without redeeming social importance.

(a) If there was any such testimony, the name and address of the person or persons so testifying.

(b) If there was any such testimony, the gist of said testimony.

2. Whether any evidence was presented to the Grand Jury that the material charged in the Indictment went substantially beyond customary limits of candor in the Nation as a whole in the description or representation of matters pertaining to sex, nudity or excretion.

(a) If there was any such testimony, the name and address of the person or persons so testifying.

(b) If there was any such testimony, the gist of the said testimony.

3. Whether any evidence was presented to the Grand Jury that the material charged in the Indictment appealed to the prurient interest of the average person in the Nation as a whole.

(a) If there was any such testimony, the name and address of the person or persons so testifying.

(b) If there was any such testimony, the gist of said testimony.

4. Whether any evidence was presented to the Grand Jury that the defendants, or any of them, knew that the material charged in the Indictment was utterly without redeeming social importance; and went sub-

stantially beyond customary limits of candor in the Nation as a whole in the description or representation of matters pertaining to sex, nudity or excretion; and appealed to the prurient interest of the average person in the Nation as a whole.

(a) If there was any such testimony, the name and address of the person or persons so testifying.

(b) If there was any such testimony, the gist of said testimony.

This Motion will be based upon Rules 6 and 16(b) of the Federal Rules of Criminal Procedure, the pertinent provisions of the First, Fifth and Sixth Amendments to the United States Constitution, the Affidavit of Stanley Fleishman and the Brief in support of this Motion, as well as all the records on file herein.

DATED: August 11, 1971.

STANLEY FLEISHMAN, INC. and
GOSTIN & KATZ
/s/ By Staney Fleishman
STANLEY FLEISHMAN
Attorneys for Defendants

AFFIDAVIT OF STANLEY FLEISHMAN IN SUPPORT OF MOTION FOR INSPECTION OF GRAND JURY MINUTES.

Filed: .....

State of California, County of Los Angeles—ss.

STANLEY FLEISHMAN, being first duly sworn, deposes and says:

1. I am attorney for defendants in the above-entitled matter and make this Affidavit in support of Motion for Inspection of the Grand Jury Minutes or, Alternatively, for Particulars as to What Evidence was Presented to the Grand Jury.

2. I have labored for many years in the area of the law having to do with obscenity. I argued the first modern obscenity case in the Supreme Court, *Alberts v. California*, 354 U.S. 476, and some one-half dozen additional cases since that date. Additionally, I have tried a large number of obscenity cases in various parts of the country. I am, I believe, an "expert" in this area of law.

3. In my opinion, it is necessary for the Government to present to the Grand Jury at least some evidence of each of the elements of the offense of a violation of 18 U.S.C. §1461 to validate a grand jury indictment. These elements, at a minimum, are:

(a) that the material was utterly without redeeming social importance; and

(b) that the material went substantially beyond customary limits of candor in the Nation as a whole in the description or representation of matters pertaining to sex, nudity or excretion; and

(c) that the material appealed to the prurient interest of the average person in the Nation as a whole.

4. In my opinion, guilty knowledge is a constitutionally mandated requirement under 18 U.S.C. §1461. In my opinion, this means that the prosecution is required to allege and prove that the defendants knew the charged material was utterly without redeeming social importance; and went substantially beyond customary limits of candor in the Nation as a whole in the description or representation of matters pertaining to sex, nudity or excretion; and appealed to the prurient interest of the average person in the Nation as a whole.

5. It is my belief, based upon the handling of scores of obscenity cases, that the Grand Jury was not presented with any evidence establishing that the charged material was obscene under the three-pronged test set forth by the United States Supreme Court in *Memoirs v. Massachusetts*, 383 U.S. 413.

6. It is my belief, based upon the handling of scores of obscenity cases, that the Grand Jury was not presented with any evidence that the defendants had knowledge that the material met the three-pronged test set forth by the United States Supreme Court in *Memoirs v. Massachusetts, supra.*

7. In a large number of federal obscenity cases the Government has advised the Court that no minutes of the Grand Jury proceedings were available. Even if there are no such minutes the Government should be required to state in writing what, if any, evidence was presented to the Grand Jury with regard to the obscenity of the material and the knowledge of the defendants.

/s/ Stanley Fleishman
STANLEY FLEISHMAN

GOVERNMENT'S OPPOSITION AND RESPONSE TO DEFENDANTS' MOTION FOR BILL OF PARTICULARS.

Filed: August 27, 1971.

Comes now the United States, by its attorney, the United States Attorney for the Southern District of California, and in opposition to defendants' Motion for a Bill of Particulars in the above captioned matter, states as follows:

The defendant's Motion for a Bill of Particulars consists of thirteen separate requests. The Government's response will be similarly designated.

1. The terms "obscene, lewd, indecent, lascivious, filthy, and vile" used in Counts 2-21 of the indictment are intended to have the same meaning to wit: "obscene." See *Manual Enterprises v. Day*, 370 U.S. 478, 483-84, n.5 (1962).

2. With respect to the defendants' request that the Government "state the essential elements of that term (obscene)," the Government notes that counsel for the defendants has apparently already arrived at a conclusion regarding what he personally perceives to be at least the bare minimum insofar as "essential elements" of that term are concerned. See Affidavit of Stanley Fleischman in Support of Motion for Inspection of Grand Jury Minutes, p. 2. Without conceding at this time the accuracy of defense counsel's view of the law in that regard, the Government will, for purposes of answering this motion, assume *arguendo* that the three-fold test, as enumerated in the plurality opinion

in *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966), is the appropriate standard.

3. Such an assumption having been made, the Government's response to Point 3 of the defendants' Motion for a Bill of Particulars is that a claim of absence of redeeming social value in the advertisements alleged to be obscene in Counts 2 through 14 of the indictment is implicit in the allegation in each count. With respect to subsections (a) and (b) of Point 3 of defendants' Motion for a Bill of Particulars, the Government's response in that regard is controlled by its Memorandum in Opposition to Defendants' Motion for Inspection of the Grand Jury Minutes filed in this matter. The Government hereby offers the same response to the other similar inquiries found in the defendants' Motion for a Bill of Particulars, requests 4-9, inclusive.

4. It is not claimed in Counts 2 through 14 that the book offered for sale in the advertisements in those counts of the Indictment is utterly without redeeming social value. Such an allegation is quite irrelevant to the charges proffered in Counts 2 through 14. However, this statement is no concession by the Government that the book *does* have "redeeming social value." This is merely to state that absence of such a quality is not alleged in those particular Counts.

5. Implicit in an allegation of obscenity of the book in question, as found in Counts 19 through 21 of the Indictment, is the claim that the book appeals to the prurient interest of the average person. The Govern-

ment, however, notes that there is no requirement to show prurient interest of the average person "in the Nation as a whole." The "Nation as a whole" requirement applies only to the issue of "contemporary community standards." See *Jacobellis v. Ohio*, 378 U.S. 184, 191-93 (1964).

6. Subject to the same reservation articulated in No. 5, *supra*, the Government states that it is implicit in an allegation of obscenity as to the advertisements named in Counts 2 through 14 that such advertisements appeal to the prurient interest of the average person.

7. It is not so claimed.

8. Insofar as Counts 2 through 14 are concerned, implicit in an allegation of obscenity as to the advertisements named therein is the allegation that said advertisements go substantially beyond customary limits of candor in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity, or excretion. There is no such requirement insofar as the charge brought in Counts 15 through 18 is concerned, and no such allegation is there made. However, this statement is no concession on the part of the Government that the advertisements charged in Counts 15 through 18 are not obscene. This is merely to state that the Government need not assume that burden of proof insofar as those four Counts are concerned.

9. Implicit in an allegation that the books named in Counts 19 through 21 are obscene is the allegation

that the books named therein go substantially beyond customary limits of candor in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity, or excretion.

10. It is not claimed that each of the defendants knew that the materials charged in Counts 2 through 14 and 19 through 21 of the indictment were, in fact, obscene. The allegation of knowledge in those counts calls for nothing more than knowledge on the part of each defendant as to the nature of the contents of each mailing. See *Rosen v. United States*, 161 U.S. 29 (1896). For further discussion of this point, see Point II(B) of the Government's Memorandum in Opposition to Defendants' Motion to Dismiss filed in this matter.

11. The persons named as addressees in Counts 2 through 13 and Counts 15 through 18 of the indictment are real persons. The persons named as addressees in Count 14 and in Counts 19 through 21 of the indictment are fictitious. The real names of the fictitious persons listed in those Counts of the indictment are set out below:

Count 14—Donald Schoof
Count 19—Robert Herzog
Count 20—Donald Schoof
Count 21—Frank Allain

12. The fictitious name addressees in the indictment (see No. 11, *supra*), are all Postal Inspectors employed by the Postal Inspection Service of the United States Postal Service.

13. As noted in Item 6 of the Government's Memorandum in Response to Defendants' Motion for Discovery and Inspection, the Government intends to, prior to trial, allow the defendants ample opportunity to examine the materials alleged in each and every count of the indictment to be non-mailable.

Respectfully submitted,

/s/ Harry D. Steward
HARRY D. STEWARD
United States Attorney

/s/ Warren P. Reese
WARREN P. REESE
Chief Assistant United States Attorney

/s/ Larry E. Butcher
LARRY E. BUTCHER
Department of Justice
Criminal Division
Washington, D.C. 20530

AFFIDAVIT OF JAY ZISKIN IN SUPPORT OF MOTION TO DISMISS INDICTMENT.

FILED: September 8, 1971.

State of California, County of Los Angeles—ss.

JAY ZISKIN, being first duly sworn, deposes and says:

1. I am an attorney duly licensed to practice in the State of California and am also a clinical psychologist licensed to practice in the said State. In addition, I am a Professor in counseling at California State College at Los Angeles. I received my LLB degree from the University of Southern California Law School in 1946 and my Ph.D. in Clinical Psychology from the University of Southern California in 1962.

2. I was engaged in the practice of law from 1946 to 1962. Since then, I have been in private practice as a consulting psychologist. I have also been employed since 1962 as a counselor by the California State College at Los Angeles, with the present rank of Professor in Counseling. I have taught courses in psychology at both the University of Southern California and at California State College at Los Angeles, including courses in Introductory Psychology, Contemporary Psychology, History of Psychology, Testing the Mentally and Physically Atypical and Methods of Appraising Personality. I have taught courses in Law and Psychology at the University of Southern California Law Center and in the University of Southern California Graduate Department of Psychology. I was Chief Research Psychologist for the University of Southern California Institute of Psychiatry and Law. I am a former member of the American Psychological Association Committee on Psychology and the Law and former President of the American

Psychology-Law Society. I am currently Contributing Editor of the Psychology and Law section of the Journal of Professional Psychology and Chairman of the California State Psychological Association Task Force on Justice and Law Enforcement. I served as a panel member in a symposium on psychiatry and law at the conference of California Judges in 1964. I have presented several papers at professional association meetings and have published several articles in the area of psychology and the law. I am the author of a book, "Coping With Psychiatric and Psychological Testimony", Law and Psychology Press, 1970.

I have been qualified as an expert and have testified regarding psychological issues in a variety of legal matters. I have appeared as an expert witness in several obscenity trials; have presented papers on the role of the psychologist in obscenity trials before professional organizations; and have lectured before various religious and civic groups on the subject of obscenity and the law.

3. In my opinion, the tests for judging obscenity are incapable of objective measurement. The terms are vague and incomprehensible. For example, with respect to the requirement that the material appeal to the "prurient interest of the average person", the Supreme Court, because of the inherent vagueness of the terms, has been required to further define the words as "a shameful or morbid interest in nudity, sex or excretion". From a psychological point of view, the "prurient interest test", with its myriad definitions of "lustful thoughts, itching, morbid, lascivious longings, shameful and morbid interest", suffers not only from incomprehensibility of meaning, but is also basically untenable from a substantive viewpoint.

To begin with, the term "average" has multiple meanings, rather than a singular meaning. It may signify the arithmetic mean, it may signify the median, it may signify the mode. It may mean the middle 50% or, at least in psychological usage, the middle 68% (based upon the concept of one standard deviation above or below the arithmetic mean).

Further, with regard to the type of sexual stimuli responded to and the manner or nature of the response, there appears to be such a wide variety of responses in the American population as to preclude any meaningful application of the term "average". The findings of the President's Commission on Obscenity and Pornography, as well as earlier and other works, strongly indicate that the response to sexual stimuli is influenced by age, sex, religious orientation, social class, family background, sexual experience and other personal experiences. (See Report, Bantam Ed. 1970, pp. 233-256). Within the American populace, there is such heterogeneity with regard to sexual matters as to preclude establishment of any frame of reference that would encompass a group of such proportion as to be called "representative".

Moreover, it is doubtful that material could be found that appeals predominately to the shameful or morbid interest in sex of the average person for the simple reason that such interest does not exist in average people, assuming that by average people we mean psychologically normal people. Interest and curiosity concerning sex and sexual matters is entirely normal. Interest in the unusual, the exotic, the bizarre, are quite normal. In fact, operators of circuses have exploited this very normal human motive for generations. A

shameful or morbid interest in sex (or any other matter) would at least be suggestive, if not indicative, of some psychological disturbance in the individual.

The prurient interest test is simply a self-contradictory and meaningless test. An "average person" does not have an abnormal interest, and the Supreme Court has rejected any test based upon what the average person would conclude has prurient interest for some "highly susceptible person". Words like "prurient", "morbid", "itching", "shameful", and like terms, may reflect the subjective moral, literary or artistic viewpoints of particular individuals, but the terms do not provide any clear and certain standard for ascertaining the difference between material which purportedly has a "legal" erotic effect or "illegal" erotic effect.

4. The terms "contemporary community standards" or "customary limits of candor" are as ambiguous and incomprehensible as "prurient interest". The facts of heterogeneity with regard to sexual matters heretofore discussed on the issue of prurience apply equally to the element of customary limits of candor. Whether material goes substantially beyond contemporary community standards will depend on the geographic character of the "community"; the composition of the particular "community" and, finally, who the person is who purports to determine what "community standards" are. The customary limits of candor at a military barracks (if, indeed, there are any such limits) are vastly different from those in the church. The limits of candor among young people appear to be considerably different from those existing among older people.

5. No commodity that is consumed by significant numbers of people can be deemed utterly without re-

deeming social value. The mere fact of its consumption indicates that it is meeting the needs of that segment of society which consumes it. No one would deny that the printing of books in braille has social value, although it meets the needs of only a very small minority of the population. As explicit sexual materials meet whatever the needs may be of a considerable segment of the population, they too must be considered to have social value per se. Liquor, certainly not an unmixed blessing, has demonstrated by its long history that it must be of some use to man. The long history of "obscenity" suggests the same conclusion. The permeation of the world's literature with themes of violence, treachery, perfidy and foul play indicate that some need of man is being met by such themes. So it is too with the nearly universal existence of explicit sexual material.

There is very little, if any, "obscene" material which does not have some educational value. There is a great deal of sexual ignorance in America. Simply learning about something not previously known is educative. If nothing else, explicit sexual materials in some instances serve to acquaint people with the existence of sexual behaviors and sexual attitudes with which they may not have been previously familiar. In another sense, as long as "obscenity" continues to be a social or legal issue, people ought to have the opportunity to observe it and learn what it is so that they may make rational decisions based on their own experience with regard to their own position on the issues of "obscenity". That explicit sexual materials are found educational or informative by a considerable proportion of viewers appears fully supported by the findings of the Commission. Also, the findings of the Commission indicate that viewing of explicit sexual materials

by married couples has led to an increased openness in discussing sex, with new learning about sex as an undoubted consequence.

It cannot be doubted that explicit sexual materials have recreational value in providing entertainment and escape for individuals. When the average individual who spends most of his adult life going about his work, raising his family, keeping up his home, etc., reads a book, he is generally not interested in reading a book about an average individual who goes about his work, raises his family, and so forth. He wants to read about the less usual kind of person, a hero or a villain, or someone with a problem that is different from those most people face, or who operates in an exotic or unusual environment, or who lives a more dramatic or colorful life than most people do, or who does something out of the ordinary. James Thurber's classic short story, "The Secret Life of Walter Mitty", illustrates this point. While accompanying his wife on a routine shopping trip, Walter enjoys a series of imaginary adventures. For example, he executes heroic feats as a World War I fighter pilot or an FBI agent. He is vicariously or imaginatively experiencing activities in which he will never engage. He enjoys this because he is gratifying a well-known human urge for adventure and new experience and recognition.

William Thomas, a social psychologist, many years ago described the four basic drives of man as the desire for love, recognition, new experience and security. For the average person, the latter three urges must largely depend on the fictional or imagined experience. In books or in daydreams he can be the conquering hero without danger of injury. He can be the superlover without the anxieties, guilts or other personal

problems which might exist in real life affairs. He can be important, serious, devil-may-care, handsome, rich, brilliant, witty, and he can suffer through conflict and misfortune, indulge in all manner of good and all manner of evil, without in any way affecting his real life, except possibly to return to it refreshed as a result of his fictional excursion.

Reading or viewing explicit sexual materials, or other materials, provides the same escape, entertainment and renewal as other recreational activities. One man may choose this form of entertainment, while another kills animals with a gun or watches two men beat each other savagely in the ring or 22 men attempting to batter each other physically in a football game, or he may lie by the riverbank with a fishing pole in hand, or dance, or chase a little white ball over a golf course. Such activities also provide a vital safety valve in human existence. They enable him to escape temporarily from the tensions and problems of everyday life. The magnitude of the entertainment and recreation industries in America attest to the depth of this human need. As considerable numbers of people appear to find satisfaction of this need through sexual materials, the social value of such materials in this regard seems obvious.

With regard to literary and artistic values, it is difficult to imagine any materials which would not possess these to some degree. The elements of aesthetic experience have not yet been determined. Gustav Fechner attempted this task a hundred years ago and failed, and no one since his time has succeeded. This is partly because the nature of literary and artistic experience is subjective. One man's art may be ugly or incompre-

hensible to another. It is a truism that beauty is in the eye of the beholder.

It is generally accepted among psychologists that fantasy serves a useful function in the lives of most normal people. It is useful in that it allows an individual to engage in vicarious trial and error and to experience things imaginatively without risking any of the consequences that might be attendant upon any such action in real life. Fantasy is also useful as providing a channel for partial discharge of various impulses. A person can work off some feelings of aggression watching the fights or a football game, and can partially discharge sexual desires by reading or thinking about sex. An employee, for example, who is angered by his employer, can discharge some of the feeling by imagining himself punching the employer in the nose without suffering any of the consequences of actually taking such action. In psychotherapy, people are often encouraged to use fantasy and verbalization of the fantasy as a means of partially discharging otherwise undesirable impulses. Furthermore, fantasy can provide some pleasures, again without requiring any action. It has been well demonstrated that sexual stimulation, even without consummation, is pleasurable.

The existence of curiosity, including sexual curiosity, has been described above as a powerful and normal human motive. Its existence is attested to by the overwhelming success of the recent best selling book by Dr. Reubens, "Everything You Always Wanted to Know About Sex But Were Afraid to Ask". The note of pathos underlying this humorous title should not go unnoticed. It seems tragic that people wishing information about this vital area of human behavior should feel afraid to seek such information. To the extent that

explicit sexual materials meet this normal human need, they are clearly serving a socially useful purpose. While "obscenity" is obviously not the only mode for satisfying this curiosity motive, it may well be the most psychologically available mode for people who are unlikely to read, for example, a medical text book.

Finally, it should be noted that the important social institution of marriage is in considerable jeopardy at the present time. Anything that serves to strengthen and improve the marriage relationship would seem to have obvious social value. Improved communication, including communication about sex, and improved sexual relationships strengthen and improve marriage. The findings of the Commission appear to clearly support the contention that explicit sexual materials stimulate such improved communication and sexual relationships for a considerable proportion of married couples.

6. In view of all the foregoing, it is my considered opinion that the law relating to "obscenity" is excessively vague, ambiguous and incomprehensible. The definition is not one which can be applied by ordinary individuals, including those most concerned, such as booksellers, law enforcement officials and jurors. There is, in fact, no body of knowledge by which experts such as behavior scientists and mental health professionals can make a determination that a given work appeals predominantly to prurient interest of the average person. There is a body of research, mostly contained in the Report of the Commission, which strongly suggests that the definition is one which cannot be met. While, as in all behavioral science research, questions can be raised concerning the methodology and interpretation of individual studies, nevertheless the conclusions of the Commission should be

given great weight. It is important to note that the bulk of the conclusions contained in the studies, based on different methods and sampling of different populations, generally support the findings of the Commission. In view of the substantial agreement among the studies, this must be considered the best available scientific evidence on the issues. Such evidence is especially important in an area where such a high degree of subjectivity is involved and even more so where subjective response is likely to be highly influenced by superstition, myths and unvalidated assumptions.

The charge of excessive vagueness applies also to the question of social value. Social value is an amorphous concept, with regard to which it would be impossible for any individual, be he ordinary or expert, to determine whether it does or does not exist. With regard to specific social value suggested by the courts, it would be equally impossible to say that all of them exist in zero quantity with regard to any given work.

One further point should be made. There is a discrepancy in studies reported and conclusions drawn by a majority of the Commission and the dissenting Commissioners with regard to the attitude of the public concerning obscenity legislation. This discrepancy involves differences in stated attitudes toward obscenity laws. It is a well accepted tenet of behavioral science that the true attitudes of people in regard to a given issue can be more accurately determined by their behavior than by their statements. In this regard, it should be noted that a few years ago in California the people overwhelmingly voted down a strict obscenity law; thus, by their behavior, indicating that they do not favor such laws. This is particularly impressive in view

of the extensive financing of the campaign to pass such a law and its support by the Governor and political leader of the State, in contrast to the almost complete lack of financing and organizational structure in opposition to the proposed law. It has been my own experience in discussion period following lectures to a variety of organizations that an overwhelming majority of people involved in such discussions are either indifferent as to whether or not there are laws regulating obscene matter, or actively in opposition to such laws.

Further, if as some argue, the purpose of obscenity laws is the preservation and fostering of morality, then it should be pointed out that morality cannot exist where there is no choice. Conformity or obedience can exist under such circumstances, but morality consists of making the individual decision to do that which is right in a situation where a choice exists.

/s/ Jay Ziskin
JAY ZISKIN

ORDER DENYING DEFENDANTS' MOTIONS.

Filed: Sept. 21, 1971.

This matter came on for determination on defendants' motions to dismiss, for Bill of Particulars, for discovery and inspection and for inspection of Grand Jury minutes. The court having examined the written motions therein filed by the respective parties, the files and records herein, the cause having been submitted for decision, and the court being fully advised in the premises, it is the decision of the court as follows:

MOTION TO DISMISS THE INDICTMENT

The motion to dismiss the indictment is denied based upon the following:

1. The postal regulation prohibiting pandering advertisements (39 U.S.C. §3008) is not in point as it does not govern the distribution by mail of obscene material. Section 3010 of Title 39, United States Code, as set forth in section 3011(e) of the same title is specifically unaffected by sections 1461 or 1463 of Title 18, United States Code.

2. An indictment framed in the language of the statute is not indefinite or vague and the use of statutory language in an indictment is sufficient. The word "knowingly" as set forth in the indictment sufficiently charges knowledge of all the essential facts as relates to the charge against the defendants.

3. The question of whether the materials cannot as a matter of law be found obscene will be determined by the court at the time of trial or at a pretrial motion properly brought.

4. With respect to counts 15-18, the issue of whether or not the advertisements referred to therein

give information where, why, from whom and by what means a constitutionally protected work might be obtained is a question of fact to be determined at the time of trial.

5. Whether or not the advertisements referred to in counts 2-14 inclusive are not obscene as a matter of law will be determined by the court at the time of trial or at a pretrial motion appropriately brought.

6. Whether or not a crime is committed or whether or not there is a conspiracy to commit a crime, the latter being a separate and distinct offense from the crime itself, is a matter of fact to be determined at the time of trial.

7. Recognizing that a motion to dismiss is not a proper vehicle for attacking the sufficiency of evidence presented to a grand jury, the court is of the opinion that no competent evidence has been presented on behalf of the defendants supporting their allegation that the grand jury was not presented with sufficient evidence.

8. The court finds that the basic statute here involved, to wit, 18 U.S.C. §1461, is constitutional. *U.S. v. Reidel*, 402 U.S. 351 (1971). The indictment is proper on its face and provides the defendants with adequate notice of the charges against them and sufficiently apprises them thereof, that they, through competent counsel, can prepare and bring forth any defenses they may have thereto.

MOTION FOR BILL OF PARTICULARS

With the exception of those orders heretofore made by this court at the hearing herein, the defendants' motion for a Bill of Particulars is denied.

MOTION FOR DISCOVERY AND INSPECTION

Discovery and inspection has been granted defendants herein as heretofore stated by the court at the hearing. The order for discovery and inspection to that extent is a continuing one. All available exhibits to be used in the prosecution of this matter will be pre-marked at pretrial October 6, 1971, and made available to defendants for inspection. Failure to pre-mark available exhibits prior to the date of trial will result in their exclusion by the court at time of trial.

MOTION FOR INSPECTION OF GRAND JURY MINUTES

The government having heretofore consented to make available to defense counsel recorded statements of witnesses before the Grand Jury at time of trial, this matter is moot. Thus, the motion is denied.

DATED: September 21, 1971.

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR.
United States District Judge

Copies to:

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Chief Assistant U.S. Attorney

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6922 Hollywood Boulevard
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Louis S. Katz, Esq.
1540 Sixth Avenue
San Diego,California 92101

ORDER DENYING DEFENDANTS' MOTION TO TAKE JUDICIAL NOTICE.

Filed: Oct. 8, 1971.

This matter came on for determination on defendants' motion to determine whether the book referred to in Counts 19, 20 and 21 of the indictment and the advertisement referred to in Counts 2 through 14, inclusive, of the indictment are protected by the Free Speech and Press Provisions of the First Amendment and therefore cannot be found obscene, and defendants' request for the court to take judicial notice. The court having examined the written motions therein filed by the respective parties, the files and records herein, the cause having been submitted for decision, and the court being fully advised in the premises, it is the decision of the court as follows:

MOTION TO DETERMINE WHETHER THE BOOK REFERRED TO IN COUNTS 19, 20 and 21 OF THE INDICTMENT AND THE ADVERTISEMENT REFERRED TO IN COUNTS 2 THROUGH 14, INCLUSIVE, OF THE INDICTMENT ARE PROTECTED BY THE FREE SPEECH AND PRESS PROVISIONS OF THE FIRST AMENDMENT AND THEREFORE CANNOT BE FOUND OBSCENE

a. The advertisements referred to in Counts 2 through 14, inclusive, of the indictment are not found, as a matter of law, to be not obscene.

b. The book referred to in Counts 19, 20 and 21 of the indictment are not found, as a matter of law, to be not obscene.

c. The advertisement referred to in Counts 15 through 18 of the indictment cannot be said, as a matter of law, to not give information as to where, how, and from whom obscene material may be obtained.

DEFENDANTS' REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE

The court denies the request that it take judicial notice of the case decisions delineated in the defendants' moving papers. The request that the entire files of such cases be produced is also denied. The court has reviewed extensively the case law on the subject of obscenity and is fully able to make the necessary legal determinations in the case before it without specific acknowledgment of the cases, singly or as a group, put forth by the defense.

DATED: October 8, 1971.

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR.
United States District Judge

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NOTICE OF MOTION AND MOTION TO CHALLENGE JURY PANEL.

Filed: Oct. 12, 1971.

TO: HARRY STEWARD, United States Attorney; WARREN P. REESE, Chief Assistant U.S. Attorney and LARRY E. BUTCHER, Department of Justice:

PLEASE TAKE NOTICE that this matter will come on for hearing before the Honorable Gordon Thompson, District Court Judge on Wednesday, October 13, 1971 at 9:00 a.m. or as soon thereafter as defendants may be heard on the motion to strike the jury venire on the grounds that the jury as chosen does not comply with the Jury Selection and Service Act of 1968, that the jury panel does not constitute a cross-section of the community and that the jury panel excludes registered voters and is unfavorably weighted with persons who might be prejudiced against the defense in a case of this type.

Dated: October 11, 1971.

GOSTIN & KATZ, INC. &
STANLEY FLEISHMAN
/s/ By: Louis S. Katz,
Louis S. Katz,
Attorneys for Defendants

Filed: Oct. 12, 1971.

COME NOW defendants by and through their attorneys and move this Court for an order pursuant to 28 U.S.C. § 1867 striking the jury venire on the following grounds:

1. Substantial failure to comply with the Jury Selection and Service Act of 1968 (28 U.S.C. 1861 et seq.) in selecting the petit jury. (28 U.S.C. 1867 (d)).

2. There is a systematic exclusion of an identifiable group within the community.

3. The jury wheel does not contain voter registration lists of persons registered in either the most recent state or the most recent Federal general election.

4. The present plan systematically excludes persons 25 years of age and under.

5. The one year residency requirement for jurors required by the act and plan violates a citizen's right to freedom of travel and denies equal protection under the Fourteenth Amendment and the due process clause of the Fifth Amendment.

6. The act's minimum age requirement of 21 years for jurors is a violation of the equal protection of the Fourteenth Amendment.

WHEREFORE, defendants respectfully pray that an order be entered requiring that:

1. The petit jury wheel be augmented prior to the trial by including a sufficient number of persons in those age categories that are not represented or underrepresented on the present jury venire so as to provide a fair representation on the jury of all age groups.

2. That the additions to the jury panel specifically include a proportionate number of persons between the

ages of 21 and 25, said persons having been systematically and completely excluded from the constitutionally infirm jury venire heretofore instituted.

3. That the additions to the jury panel specifically include persons between the ages of 18 and 21 years of age who are registered voters and who have registered since the jury wheel selection was made in 1968.

4. In the alternative that a new jury panel be called forthwith based on the voters' registration lists including persons who have registered to vote from the age of 18, and that such lists be a cross-section of the community.

5. Such other and further relief as to the Court may seem just and fair in order to insure a jury trial for the defendants by a jury of their peers.

Respectfully submitted,

GOSTIN & KATZ, INC. &
STANLEY FLEISHMAN
By: /s/ Louis S. Katz
Louis S. Katz

Dated: Oct. 11, 1971.

AFFIDAVIT OF ALFRED P. KNOLL IN SUPPORT OF MOTION TO STRIKE JURY PANEL.

Alfred P. Knoll, being duly sworn, deposes and says:

1. That he is an attorney at law licensed to practice in the State of California and before this Honorable Court.

2. That between the dates of June 16, 1971 and June 23, 1971 he was coordinator of a group of students who pursuant to Court Order in the above captioned cause were privileged to examine the jury records utilized by this Court.

3. That said group examined the questionnaires returned to the Clerk of this District Court of every juror and potential juror for this District Court since the present jury selection system went into effect.

4. That 10,293 questionnaires to prospective jurors were examined and that 8,993 prospective jurors responded to the questionnaires, and of those, 8,640 listed their date of birth.

5. That according to figures obtained from the Summary of 1970 Census Advance Report, General Population Characteristics for County of San Diego, the following is an accurate age breakdown as to the present population and percentage of population of San Diego County, and those originally placed in the Master Jury Wheel:

Age	Population of S.D. County		The Present Number of Jurors Originally Placed in the Master Wheel	
21	36,277	(2.67%)	0	(0%)
22			0	(0%)
23	85,612	(6.30%)	2	(0.02%)
24			99	(1.03%)
25			129	(1.37%)
26 — 30	172,655	(12.72%)	603	(6.97%)
31 — 34			7,807	(90.51%)
35 & Over	517,787	(38.13%)		
	1,357,854	(59.82%)	8,640	(100%)

6. That the age of those in the Master Jury Wheel is their age as of June 22, 1971.

7. That on May 19, 1971, Affiant had a conversation with William W. Luddy, Clerk of the District Court for the Southern District of California.

8. That in that discussion, Mr. Luddy stated:

A. That those selected for the Master Jury Wheel were picked from voter registration lists of June, 1968.

B. That the Master Wheel has not been updated by names from more recent lists of registered voters—or from any other lists.

C. That the present Wheel will be used until November, 1971.

Further deponent sayeth not.

/s/ Alfred P. Knoll
Alfred P. Knoll

AFFIDAVIT OF STANLEY FLEISHMAN IN SUPPORT OF CHALLENGE TO TRIAL JURY.

FILED: October 13, 1971.

State of California, County of Los Angeles—ss.

STANLEY FLEISHMAN, being first duly sworn, deposes and says: I am one of the attorneys in the above entitled matter and make this Affidavit in support of defendants' challenge to the trial jury.

1. A trial jury plays a unique role in an obscenity prosecution. Indeed, the Government herein, in its memorandum brief on admissibility of other publications contends that a determination of "obscenity" is made by the jury making a subjective moral judgment with regard to the material, without any objective standards. While defendants do not agree with the Government's theory, it is true that the biases and prejudices of a jury play a particularly prominent role in an obscenity case, such as the one at bar.

2. The record in the case at bar demonstrates that there is systematically excluded from the trial jury selected to try defendants all persons who are 18 years of age, 19 years of age, 20 years of age, 21 years of age, 22 years of age, 23 years of age and 24 years of age.

3. *The Report of the Commission on Obscenity and Pornography* has found that older teenagers, including those 18 years of age and over, and those adults aged 21-29, inclusive, have a significantly different attitude towards allegedly obscene material, which attitude is more tolerant and accepting than those of persons 29 years of age and over. In my opinion, it is impossible for the defendants to obtain a fair trial in the case at bar by reason of the systematic and deliberate exclusion of young persons.

/s/ Stanley Fleishman
STANLEY FLEISHMAN

DEFENDANTS' PROPOSED JURY INSTRUCTIONS.

Instruction No. 20.

You should take into account the material found to be not obscene by courts of competent jurisdiction in determining whether or not the evidence proves, beyond a reasonable doubt, that the book and advertisements are obscene.

Instruction No. 26.

The defendants are charged under a general, all-encompassing obscenity statute, not a narrowly drawn one. In short, before you can find the book and advertisements to be obscene, as charged, you must find, beyond a reasonable doubt, that they are obscene, even if they were directed at, and reached, only consenting adults. The fact, if you find it a fact, that there were unsolicited mailings is of no importance in this particular case.

Instruction No. 38.

Congress has passed a law which recognizes that it is not a criminal offense to mail unsolicited sexual advertisements. That law assumes that there will be people who desire to receive such advertisements and people who do not desire to receive them. The law secures the right of all persons, including the defendants, to mail such advertisements to those persons who desire to receive them. With regard to those who do not desire to receive them, the remedy Congress chose was to have the Postmaster General order the mailer to discontinue mailing to those persons who have asked for such protection. You may not find the defendants, or any of them, guilty under the present charge, which is brought

under the criminal law, merely because you may find that the defendants, or any of them, have mailed unsolicited sexually oriented advertisements to persons who did not desire to receive such advertisements.

Instruction No. 54.

The statute here requires that the defendants acted knowingly. This means that the Government must prove, beyond a reasonable doubt, that the defendants had a guilty knowledge. In other words, the proof must show, beyond a reasonable doubt, that the defendants knew that the material here involved patently offended contemporary standards, and went substantially beyond customary limits of candor; and, in addition, knew that the dominant theme of the material, to the average person applying contemporary standards, taken as a whole, appeals to prurient interest; and, in addition, knew that the material was without ideas and utterly without redeeming social importance.

Unless the proof establishes such knowledge of obscenity, beyond a reasonable doubt, the defendants must be acquitted.

Instruction No. 55.

The mere fact alone that a defendant knew the contents of the material, if you should find such a fact, does not for that reason alone, justify an inference that the said defendant knew the material was obscene.

Instruction No. 61A.

If you believe that any defendant was honestly ignorant of the alleged obscenity of the book and advertisements here involved, then that defendant should be found not guilty.

Instruction No. 64.

Even if you find that the defendants, or any of them, knew that the book and advertisements dealt with sex and portrayed sexual activities pictorially, that fact, in and of itself, is insufficient to support a finding that the defendants, or any of them, was aware of the obscene character of the material.

Instruction No. 66.

The statute herein requires proof, in addition to knowledge, of obscenity, of a specific intent to appeal to the prurient interest of the person to whom it is mailed. Unless such specific intent is established, beyond a reasonable doubt, as to the defendants, or any of them, the defendants must be found not guilty.

Instruction No. 67.

Counts 2-21, inclusive, of the Indictment charge a serious crime which requires proof of specific intent before the defendants can be convicted. "Specific intent", as the term implies, means more than the general intent to commit the act. To establish specific intent, the Government must prove, beyond a reasonable doubt, that the defendants knowingly did an act which the law forbids, purposely intending to violate the law.

Instruction No. C-68.

The burden is upon the Government to prove the following ingredients of the offense charged in Count 1 of the Indictment:

1. That each of the defendants knowingly and wilfully entered into a corrupt agreement specifically intending to violate the obscenity law, and

intending to publish, and distribute, the book and advertisements specified in the Indictment with specific knowledge that the said book and advertisements are obscene;

2. That to the average person, the dominant theme of each of the advertisements and book, taken as a whole, substantially exceeds the customary limits of candor, in the Nation as a whole, in the description or representation of sex, nudity or excretion; and, in addition, appeals to the prurient interest of the average person; and, in addition, is utterly without redeeming social importance;

3. That each of the defendants knew that the dominant theme of each of the advertisements and book, taken as a whole, substantially exceeded the customary limits of candor, in the Nation as a whole, in the description or representation of sex, nudity or excretion; and, in addition, appealed to the prurient interest of the average person; and, in addition, was utterly without redeeming social importance;

4. That each of the defendants knew that the book and advertisements were obscene and mailed them intending to appeal to the prurient interest of the average person, in the Nation as a whole;

5. That the defendants, after the formation of the alleged conspiracy, committed the overt acts charged in the Indictment, and that such overt acts were committed in pursuance of the alleged conspiracy and to effect the alleged illegal object of the conspiracy.

Instruction No. 97.

In determining the issue of contemporary community standards, the jury should take into consideration that the United States Supreme Court has held that a person wearing a jacket bearing the words "Fuck the Draft" in a corridor of a courthouse cannot be found guilty of disturbing the peace by alleged offensive conduct and that such expression cannot in any way be deemed erotic.

Instruction No. 102.

The mere fact that the book and advertisements here were sold under commercial auspices, or that defendants made a profit from such sales, does not in any way prove that defendants "pandered" the material. The jury cannot presume or infer pandering from the mere dissemination of the book and advertisements under commercial auspices or for profit.

Instruction No. 109.

The jury is instructed that the Federal Obscenity Statutes do not apply to books, advertisements or other depictions or representations of sex and nudity which are deemed to be vulgar, revolting, offensive or tasteless. If the jury should find that the effect of the book and advertisements involved in the case herein would be to create only such reactions in the average person, then these facts should be considered in determining whether the Government has proved that the book and advertisement are obscene as defined by the Court.

Instruction No. 110.

With respect to the issue of prurient interest, the jury will keep in mind that sex is not obscenity and that the predominant appeal of the book and advertisements here involved must be to the shameful and morbid interest of the average person in the Nation as a whole. If the jury should find that the text of the "Illustrated Report" is a serious work of great importance to a public issue, and that the pictures in the "Illustrated Report" are essential to an understanding of the issues and arguments in the Commission's Report, then the jury would be justified in finding that the material did not appeal to the prurient interest of the average person.

Instruction No. 115.

If the jury should find that the defendants honestly believed that the book and advertisements had social importance and value, or did not appeal to the morbid and shameful interest in sex of the average person, or did not substantially exceed contemporary community standards in the depiction or representation of sex or nudity, then these facts should be considered in determining whether the Government has proven that the book and advertisement are obscene as defined by the Court.

Instruction No. 117.

The jury is instructed that no publisher or distributor of materials or advertisements dealing with sex is an absolute guarantor of the sexual purity of the material he disseminates. A publisher or distributor cannot be found guilty of distributing obscene materials under the Federal law unless it is established beyond a rea-

sonable doubt that he knew the contents of the material and knew that the contents were obscene. Therefore, in the case herein, if the proof shows no more than the material was obscene, then the jury must acquit the defendants because guilty knowledge has not been established. If the proof shows no more than that the defendants knew the contents of the book and advertisements, then the defendants must be acquitted. The proof must show beyond a reasonable doubt not only that the material here involved is obscene as the Court has defined obscenity, but the proof must also show beyond a reasonable doubt that the defendants knew that the material was obscene.

Instruction No. 121.

The jury is instructed that the following types of activities do not constitute "pandering": The display of allegedly obscene publications openly at a newsstand; the mere display and sale of allegedly obscene materials; the references in an allegedly obscene book to other books available from the same publisher containing allegedly prurient materials; lurid pictures and text on the front and back covers of an allegedly obscene book; distribution of publications at a mark-up from $.24 to $5.00 a copy. The jury can only find "pandering" when the evidence establishes beyond a reasonable doubt that the accused openly proclaimed the obscenity of the material he was disseminating. That is, clearly indicated that the accused believed the material substantially exceeded contemporary community standards in the Nation as a whole in the depiction or representation of sex or nudity and appeals to the prurient interest of the average person and is utterly without social importance or value.

DEFENDANTS' PROPOSED QUESTIONS ON VOIR DIRE.

* * *

42. Do you believe that your present views concerning obscenity are influenced by your religious training or beliefs, educational background and experience, political affiliation, upbringing as a child and area or areas in which you lived.

If the answer to the foregoing is in the affirmative, please explain.

43. How frequently do you attend a place of worship?

44. Do you consider yourself to be a deeply religious person?

If the answer to the foregoing is in the affirmative, please tell us how you would classify yourself in this regard.

45. Within the last 12-month period, have you heard any sermons at your place of worship dealing with the subject of obscenity or sexual conduct?

If the answer to the foregoing is in the affirmative, please explain.

* * *

47. Have you, or any member of your family or close friends ever been a member of, made contributions to or associated in any way with the organization known as the Citizens for Decent Literature, or any other organization, having as one of its purposes the control, by law, of obscene material?

If the answer to the foregoing is in the affirmative, please explain.

48. Have you ever read any of the pamphlets or publications put out by the Citizens for Decent Literature, or any other organization, having as one of its purposes the control, by law, of obscene material?

If the answer to the foregoing is in the affirmative, please explain.

* * *

51. Have you ever expressed yourself in favor of, or opposition to, legislation which makes it a crime to distribute allegedly obscene material, even to an adult?

If the answer to the foregoing is in the affirmative, please explain.

52. Do you have any set views on the subject of controlling allegedly obscene matter by criminal law?

If the answer to the foregoing is in the affirmative, please explain.

* * *

56. Has any member of the jury seen, within the last 18-month period, a film which he or she believed to be erotically arousing or sexually provocative?

If the answer to the foregoing is in the affirmative, please list the names of the films.

57. Has any member of the jury viewed, within the last 18-month period, any film which contained language they found offensive, or which dealt with any of the following subjects:

(a) Prostitution;
(b) Lesbianism;
(c) Homosexuality;
(d) Adultery;
(e) Rape;
(f) Bestiality;

(g) Masturbation;
(h) Incest;
(i) Frigidity;
(j) Oral-genital contact;
(k) Impotence.

If the answer to any of the foregoing is in the affirmative, please name the film.

58. List the names of all films viewed by you within the last 18-month period.

* * *

60. Has any member of the jury read, within the last 18-month period, books or magazines which he or she believed to be erotically arousing or sexually provocative?

If the answer to the foregoing is in the affirmative, please list the names of the books or magazines.

* * *

64. Has any member of the jury heard any discussion about any of the following books: ***The Sensuous Woman; The Sensuous Man; Everything You Always Wanted to Know About Sex But Were Afraid To Ask?***

65. Has any member of the jury seen, within the last 18-month period, any television program which he or she felt was offensive because of the sexual depiction therein?

If the answer to the foregoing is in the affirmative, please explain.

* * *

71. Do you have a personal opinion as to whether any particular sexual theme should not be portrayed pictorially or in writing?

If the answer to the foregoing is in the affirmative, please explain.

72. Would you refrain from viewing a film solely for the reason that it was condemned by the Catholic Film Newsletter?

* * *

What is your opinion in this regard?

81. Do you know anyone personally who, to your knowledge, has had any experience with sexually explicit material which they considered to be desirable or undesirable?

Please explain.

* * *

83. Do you believe that the mere fact that sexually explicit material may arouse sexual feelings in an adult is harmful?

MOTION IN ARREST OF JUDGMENT.

FILED: Jan. 11, 1972.

The defendants, and each of them, move the Court for an order arresting judgment herein on the ground that the Indictment does not charge an offense. The grounds for said motion are:

1. The Indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense against the United States.

2. No facts sufficient to constitute an offense against the United States were presented to the Grand Jury which returned each count of the Indictment herein.

3. The Indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense against the United States because the Indictment failed to allege the essential elements of obscenity.

4. Counts 2-18, inclusive, of the Indictment fail to state facts sufficient to constitute an offense under 18 U.S.C. §1461 because the advertisements are regulated exclusively by 39 U.S.C. §3008, which section deals with advertisements which are allegedly pandering.

5. The Indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense against the United States because:

(a) The advertisements referred to in Counts 2-14, inclusive, of the Indictment are, as a matter of law, not obscene, because:

(i) The book "The Illustrated Presidential Report of the Commission on Obscenity and Pornography", referred to in Counts 19-21, inclusive,

of the Indictment, is clearly protected by the free speech and press provisions of the First Amendment and, as a matter of law, is not obscene.

(b) The advertisements referred to in Counts 2-14, inclusive, of the Indictment, are as a matter of law not obscene, but on the contrary are protected by the free speech and press provisions of the First Amendment to the United States Constitution.

(c) The advertisements referred to in Counts 15-18, inclusive, of the Indictment give information as to where, how, from whom and by what means a book, protected by the free speech and press provisions of the First Amendment might be obtained. The advertisements referred to in said counts do not give information where, etc., an obscene book might be obtained.

(d) Since the book, referred to in Counts 19-21, inclusive, of the Indictment are protected by the free speech and press provisions of the First Amendment, and the advertisements referred to in Counts 2-18, inclusive, of the Indictment are similarly protected, it follows that a "conspiracy" to mail the constitutionally protected book and advertisements does not constitute an offense against the United States.

6. The Indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense against the United States because the term "knowingly" as used in the Indictment excluded all guilty knowledge and referred merely to knowledge of contents of the material deposited, or caused to be deposited, in the mails.

7. The indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense

against the United States because 18 U.S.C. §1461, on its face and as construed and applied, violates the free speech, due process and equal protection provisions of the First, Fifth and Sixth Amendments, and the cruel and unusual punishment provisions of the Eighth Amendment, and the right of the People preserved by the Ninth and Tenth Amendments to the United States Constitution.

The Motion is based upon the Indictment herein, the testimony of Larry E. Butcher prior to the impanelment of the Jury, and all the papers and records on file herein.

DATED: This .... day of January, 1972.

STANLEY FLEISHMAN, INC. and
GOSTIN & KATZ
/s/ By Stanley Fleishman
STANLEY FLEISHMAN
Attorney for Defendants

MOTION FOR NEW TRIAL.

Filed: Jan. 11, 1972.

Defendants move the Court for an Order granting a new trial in the interest of justice, because the verdict is against the weight of the evidence and errors of law occurred requiring a new trial in the interest of justice.

This Motion is an alternative motion to the motions filed concurrently herewith pursuant to Rule 29(c) for a judgment of acquittal and pursuant to Rule 34 for a Motion in Arrest of Judgment.[1]

This Motion is based upon all the papers and records on file herein and all of the evidence adduced in the trial and the accompanying Brief in support of this Motion.

DATED: January 7, 1972.

STANLEY FLEISHMAN, INC. and
GOSTIN AND KATZ
/s/ By Stanley Fleishman
STANLEY FLEISHMAN
Attorney for Defendants

[1]In making this Motion, defendants do not waive their claim that they are entitled, as of right, to a judgment of acquittal.

MOTION FOR JUDGMENT OF ACQUITTAL.

Filed: Jan. 11, 1972.

Defendants move for a judgment of acquittal after the discharge of the jury without having returned a verdict on the ground that the evidence is insufficient to sustain a conviction.

This Motion is based upon all the papers and records on file herein and all of the evidence adduced in the trial and the accompanying Brief in support of this Motion.

DATED: January 7, 1972.

STANLEY FLEISHMAN, INC. and
GOSTIN AND KATZ
/s/ By Stanley Fleishman
STANLEY FLEISHMAN
Attorney for Defendants

EXCERPTS FROM REPORTER'S TRANSCRIPT

(Pre-Trial, Trial and Post-Trial Proceedings)

In the United States District Court, Southern District of California.

* * *

Honorable Gordon Thompson, Jr., Judge Presiding.

* * *

United States of America, Plaintiff, vs. William L. Hamling, et al., Defendants. No. 10791-Criminal and No. 11971-Criminal.

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FOLD OUT IS TOO LARGE TO BE FILMED

Please return the coupon below, with your remittance, in the enclosed self-addressed envelope.

Please send . . . . copies. Enclosed is my check or money order in the amount of $ . . . . . ($12.50 each).

I certify, by my signature below, that I am 21 years of age or over and desire the book solely for my private contemplation in the privacy of my home.

SIGNATURE .....

NAME .....
(please print)

ADDRESS.....

CITY.....STATE.....ZIP.....

C
C
POR
D

...agazine **Porno Club** *No. 3,*
...y this was filmed at a "live
...ght club in Copenhagen. There
...similar clubs.

DEFENDANTS' EXHIBITS:		Marked	Received	Withdrawn
A-1	Magazine, "Togetherness"	4367		
A-2	"Flesh and Fantasy"	4367		
A-3	Newspaper Story	4384		
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	Postal Receipt	525		4378
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N	Post Office Money Order Form		585	4410
O	Money Order (Remarked Plaintiff's Exhibit 19-D)		586	
P	Magazine		586	
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R	Magazine—"Questions and Answers"		898	
S	Post Office Report—Donald Schoof			4410
T	Post Office Report—M. Hironaka			4410
U	Book—"Science of Pornography"			4380
V	Book			1104
W	Technical Report, Vol. VI			4380
X	"Report on Obscenity and Pornography"	1385	4413	
Y	Book "Campus Unrest"			4380
Z	Walker Report			4380
AA	Kearny Report			4380
BB	Book—"Challenge of Crime in a Free Society"			4380
CC	Book—"Law and Order Rediscovered"			4380
DD	Book—"To Establish Justice to Insure Domestic Tranquility"			4380

DEFENDANTS' EXHIBITS:		Marked	Received	Withdrawn
EE	Book—"The Obscenity Report"			4380
FF	Book—"The Pentagon Papers"			4380
GG	Playboy Magazine	1401		
HH	Playboy Magazine	1427		
II	Magazine—"Nude Living"		1574	
JJ-1	SIECUS Study Guide No. 1	1838		
JJ-2	SIECUS Study Guide No. 2	1838		
JJ-3	SIECUS Study Guide No. 3	1838		
JJ-4	SIECUS Study Guide No. 4	1838		
JJ-5	SIECUS Study Guide No. 5	1838		
JJ-6	SIECUS Study Guide No. 6	1838		
JJ-7	SIECUS Study Guide No. 7	1838		
JJ-8	SIECUS Study Guide No. 8	1838		
JJ-9	SIECUS Study Guide No. 9	1838		
JJ-10	SIECUS Study Guide No. 10	1838		
JJ-11	SIECUS Study Guide No. 11	1838		
KK	Book—"Sex and Sanity"	2053		4381
LL	Large Photograph	2206		
MM	Article—"Sex Education"	2221		4413
NN	Book—"Modern Demonology"			4381
OO	Getlein's List of Errors in Illustrated Report	2254		4383
PP	Book—"Christianity in Modern Art"	2053		4381
QQ	Magazine—"Animal Love"	2854		
RR	Magazine—"The Advanced Handbook of Swingers"	2854		
SS	Newspaper Article—Evening Tribune 11-10-71	3214		4381
TT-1	Pamphlet—"Facts vs. Fears"	3214		
TT-2	Pamphlet—"Differential Movie Viewing Behavior of the Male and Female Viewers"	3214		
TT-3	Pamphlet—"Extrinsic Religious Values & Prejudice"	3214		
TT-4	Pamphlet—"Imitation & the Learning of Incidental Cues by Preschool Children"	3214		

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EFENDANTS' EXHIBITS:		Marked	Received	Withdrawn
T-5	Pamphlet—"Development of Ethnic Attitudes in Adolescence"	3214		
U	Paper—"W. Cody Wilson Curriculum Vitae"	3214		4384
V	Technical Report Vol. I	3264		4381
W	Technical Report Vol. II	3264		4381
X	Technical Report Vol. III	3264		4381
Y	Technical Report Vol. IV	3264		4381
Z	Technical Report Vol. V	3264		4381
A	Large Chart	3428	3457	4413
C	Magazine—Vol. 2 Photo Illustrated	3579		
D	Magazine—"The Advanced Handbook of Oral Sex"	3579		
E	Paper "Screw" dated August 9, 1971	3579		4381
F	Textbook "Tricks & Techniques of the Selling Writer"	3774		4381
G	Map of San Diego Area	3927		
H	Interview Questionnaire	3929		
	Survey Results	3938		
	Folder of Magazines, Cards & Pictures			4393

APPEAL EXHIBITS

O.	IDENT.	DESCRIPTION
1	October 20, 1971	Transcript Grand Jury Testimony 3-5-71—Roy Urban
2	October 20, 1971	Transcript Grand Jury Testimony 3-4-71—Donald Schoof
3	October 20, 1971	Transcript Grand Jury Testimony 3-4-71—Richard Harte
4	October 20, 1971	Transcript Grand Jury Testimony 3-4-71—Venita Harte
	October 20, 1971	Field Inspector Interview Reports furnished to Defense
	October 20, 1971	Field Inspector Interview Reports (in camera use only)
	October 20, 1971	Case Inspector—Witness Interviews, digest of Field Inspector Reports
	December 8, 1971	Article in November 10 issue of Evening Tribune

VOL. 1.

* * *

[Vol. 1, 41] Mr. Fleishman: At this time, if the Court please, we move that the Government elect as to where the Government is charging the defendants herein with regard to distributing the material, mailing material, which appeals to the prurient interest of the average person or to some other group, and if so, what that other group is.

The Court: I don't think that that is a requirement, that the Government elect, Mr. Fleishman. I don't know of any authority and I have not read any authority that the Government must elect or make an election, one or the other.

I think the Government's position, if I understand it from the voluminous material that has been provided by the Government in this case, is that [Vol. 1, 42] they are proceeding on the theory—I think Mr. Butcher explained it on the witness stand—that parts of it, of the book, may or may not appeal to deviant groups, but parts of it may or may not appeal to other groups; therefore, that it does to heterosexual as well as other persons that are non-deviant groups and I don't know of any rule of law that requires that the Government elect to proceed on either one or the other theory, nor do I know of any rule of law that says they cannot proceed as they are doing here, on both theories.

Mr. Fleishman: If the Court please, I would like to state for the record, we are unable, then, to adequately defend, if we do not know upon what the charge is. It is either one or the other, or if the Government is saying both, I would want the Government to at least advise us now what portion appeals to what

clearly defined sexual deviant group so that we would have an opportunity to defend, if that is indeed what the Government's charge is.

The Court: I don't think that that is required by the Government and I don't think that you are being in any way prejudiced by the proceedings that the Government has followed thus far, and so the motion is denied.

[Vol. 1, 43] Mr. Fleishman: I would like to state that it is neither in the Indictment, your Honor, nor the Bill of Particulars, and today is the first time—the first time that there was even a suggestion made by the Government that the material may appeal to some deviant group.

Again, to make it perfectly clear for the record, we have had no opportunity to defend with regard to any such charge. We do not waive our objections to any such theory of the case, and the evidence along that line, because we have not been advised at all with regard to such matter until this morning, less than an hour and a half ago.

* * *

[Vol. 1, 93] I cannot say that as a matter of law there has been a systematic exclusion of anyone from the panel. The representative figures which Mr. Katz quotes are interesting to the Court. They perhaps would indicate that it is time now, as contemplated by those that approved the plan, that it is time to change the jury master wheel.

* * *

[Vol. 1, 94] Mr. Fleishman: At this time, if the Court please, we respectfully move for a continuance

of the trial until such time as the corrections that the Court indicated were necessary or appropriate are made.

I understand that the Clerk is about to engage in the process of making a more representative list than we now have.

By the Court's own statement we are now at the worst possible time of this jury. The Court has indicated perhaps the time has come, and indeed by the very terms of the Order it could not go much longer.

Within that regard, your Honor, I respectfully call attention to Subsection 4 of 1863 which states that the Chief Judge of the District Court or such other District Judge—the Chief Judge of the District Court or such other District Courts as the plan may provide, may order additional names to be placed in the master jury wheel from time to time as necessary, so that there has really been a default [Vol. 1, 95] on the part of the Chief Judge or/and every District Judge sitting here, once it is acknowledged that there isn't a jury that is able to do a fair job in this case.

And I remind the Court that wherever First Amendment rights are involved, as they are here, the United States Supreme Court has admonished that we must use the most sensitive tool.

Now the most sensitive tool is the best jury we know how to select, the best cross-section, not a jury which is the worst. We are facing the worst possible jury in terms of age when age is crucial to our defense. We don't want a jury made up only of 18 to 25. We do want a jury made up of a fair cross-section, which includes the 18 to 21 and the 21 to 25.

The Court: Excuse me, Mr. Fleishman. I think you misunderstood my comments.

My comments were that perhaps it is time that the jury changes took place. I think Mr. Luddy testified that they will take place in November or something of that nature.

That may well be, but that doesn't affect this case. This case, as I say—albeit that the issues of this case may be different than the issues [Vol. 1, 96] as you point out on the robbery case or something like that—nevertheless, a jury selected in the manner as prescribed by the statute and prescribed by the general plan, there is no reason for this Court to think that such a jury could not just as capably judge this case. It may not be the most perfect that the defense would want; I don't know, because I am not that familiar with what jurors think in obscenity cases, having never tried one before. I must defer to your position there.

However, I feel that this is a representative group. I have impaneled juries here now for a year at the rate of about nine a month and inquired of 28 jurors at a time of those nine-per-month jury trial, and it seems to me that there is not only a cross-section of age and color and residence, it seems that it is a well-rounded, well-chosen, well-selected, representative group of the District.

Mr. Fleishman: Your Honor, there is a systematic exclusion necessarily of those 21, 22, 23 and most of the 24. Those are systematically excluded, so they are not represented at all, nor do we have any representation of the 18 to 21, which is a somewhat different situation. But at [Vol. 1, 97] least those are plainly eligible under the law under any standard and every standard. Those 21, 22 and 23 and most of the 24 are excluded by reason of two things:

1) The failure of the Judges in this District to freshen the jury, as they have the obligation to do, really, to keep the jury panel as a fair cross-section.

But our point is different at this stage, your Honor. We are asking your Honor as a matter of due process of law and guarantee of the First Amendment to try to continue this case for a reasonable period of time, and it can't be too long, because Mr. Luddy says the jury is going to be freshened, a whole new thing is going to go into effect in November. We are now on October 13, so we ask for a very short continuance, no longer than is necessary to bring in the group that is now totally excluded.

I am talking particularly about the 21, 22, 23 and most of the 24. I also believe that as a matter of due process we are entitled to the 18 to 21, but if we are wrong on the 18 to 21, we are absolutely right on the 21, 22, 23 and most of the 24, and that can be corrected easily, your Honor—easily and speedily, because all you have to do is continue the [Vol. 1, 98] case for a short period of time.

This is worse, really, than a situation where there is some prejudice by reason of the newspaper publicity where the courts have indicated that there ought to be a continuance to let the evil be dissipated, because there there is a question of how do you ever dissipate it.

We know that the evil found in this panel now will be corrected in part, because starting with the new master wheel we are going to have at least 21's. I hope we are going to have the 18's, but I know we are at least going to have some 21's.

It seems to me, your Honor, that it would be arbitrary, it would be a denial of due process of law, as I say, to deny the continuance in light of the record made here and particularly in light of the fact that the Commissioner and the Clerk is about to go about correcting a grievous situation.

Thank you.

The Court: All right.

I have ruled, Mr. Fleishman.

Mr. Fleishman: You haven't on the motion for continuance, your Honor. I am now moving for continuance.

The Court: All right, I will rule on the motion to continue and the motion is denied.

VOL. 3.

[Vol. 3, 403] WILLA B. REINIGER,

* * *

DIRECT EXAMINATION

* * *

BY MR. McCORRISTON:

Q Mrs. Reiniger, I will ask you if you can identify what we have marked as Government's Exhibit 2?

A Yes, I can identify this.

Q How can you identify it, ma'am?

[Vol. 3, 404] A By the contents of the envelope and also because I have initialed it on the outside under the date of January 21, 1971, when it was brought to me by the United States Postal Inspector.

Q How did these materials originally come into your possession?

A They came into my possession by first-class mail in my post office box.

Q On or about what date did you receive them?

A Between the 15th of January and the 21st, somewhere in there. I don't know the exact day.

Q Okay. Do you recall what company, if any, sent those materials to you?

A Library services.

Q Have you ever solicited any material from library services?

* * *

[Vol. 3, 405] A I have never ordered anything from this company.

Q From Library Services?

A No.

Q Have you ever ordered or solicited any materials of the nature which you have before you?

A No.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

Q Mrs. Reiniger, did I understand that the Postal Inspector brought you an envelope that you then initialed; is that correct?

A That I initialed at his request when he brought it to me. I had previously received it and turned it over to the postmaster of our post office, that I did not care to receive such mail in my box.

Q And you then signed at the post office, did you, a complaint saying that you didn't want to receive any such mail?

A I did.

[Vol. 3, 406] Q And you never have received any further mail from this company, have you?

A Not from this company, no.

* * *

[Vol. 3, 418] HELEN LYNCH

* * *

DIRECT EXAMINATION

BY MR. McCORRISTON:

* * *

Q Mrs. Lynch, I am now going to ask you if you can identify what we have marked for purposes of identification, government's 4.

A Yes, I can identify it.

Q How can you identify that, ma'am.

A I have my initial on the material and it is the same material that I received.

Q How did the materials before you originally come into your possession?

[Vol. 3, 419] A They arrived in the mail.

Q To the mailing address you have previously stated?

A Yes, sir.

Q Did you recall what company, if any, sent those to you?

A Library Service, Inc.

Q And on or about what date did this occur?

A About the middle of January.

Q Mrs. Lynch, have you ever requested from Library Services or solicited from them, any type of material?

A No, Sir.

Q And have you ever solicited any material of the nature that is before you now?

A No, sir.

* * *

[Vol. 3, 420] CROSS-EXAMINATION

BY MR. FLEISHMAN:

* * *

[Vol. 3, 421] Q Tell us the circumstances under which you initialed and dated the envelope?

A The material was received and at the time that I received the material, I called the post office department to determine what I could do to not receive this type of mail again and to determine what I should do with it. They informed me that they would send a prohibitory order for me to sign and that I should return this material with this order, which I did. I completed the order and signed it and returned it to the post office.

Q And thereafter, you never received any further mail from Library Services, did you?

Mr. McCorriston: Object to that for relevancy.

The Court: Overruled.

You may answer.

The Witness: No, I have not received any further mail from Library Services.

* * *

Vol. 3, 422] Q Is there any place on that material or anything connected with that envelope, did you see the name, "Shirley Wright"?

A No.

Q David Thomas—

Mr. McCorriston: We will stipulate none of those names appear on any of our advertisements and save counsel time.

[Vol. 3, 424] JAMES A. LYNCH,

* * *

Direct examination

BY MR. McCORRISTON:

* * *

[Vol. 3, 425] Q Can you identify the company that sent that mail to your house?

A Yes, Library Services, Inc.

Q Mr. Lynch, have you ever solicited any material from any Library Services, Inc.?

A Not to my knowledge.

* * *

CROSS-EXAMINATION

* * *

[Vol. 3, 426] BY MR. FLEISCHMAN:

Q Mr. Lynch, did you make an application to have your name withdrawn from any mailing list that Library Service might have and not receive any further mail from Library Service?

A My wife made such an application on my behalf, yes.

* * *

Q Mr. Lynch, you have before you what has been marked Defendant's F for identification. Is that [Vol. 3, 427] the application that was made on your behalf?

A That is correct.

Q Whose name is listed there?

A James Lynch.

Q Is that your signature?

A That is my wife's signature, done with my knowledge and consent.

Q And since making that application, not to receive any further mail from Library Service, have you

ever again received any mail of any kind from Library Service?

A Not to my knowledge.

* * *

[Vol. 3, 428] CHESTER H. PRIBBLE,

* * *

[Vol. 3, 429] DIRECT EXAMINATION

BY MR. BUTCHER:

Q Mr. Pribble, I will hand you what has been marked Government's Exhibit 15 for identification and ask you to identify it, if you can, sir.

[Vol. 3, 430] A Yes, Sir, I can identify it.

Q Has this material ever before been in your possession?

A Yes, sir.

Q Before today?

A Yes, sir.

Q About when in point of time was that?

A About the 15th or 16th of January, 1971.

Q Do you recall the name of the company whose name appeared on the material contained in the mailing envelope?

A Yes, sir.

Q And what was that name?

A Library Service, Inc.

Q Had you ever had any business or social or any other type contact with Library Service, Inc.?

A No, sir.

Q Did you ever solicit this material from Library Service, Inc.?

[Vol. 3, 431] A No, sir.

* * *

CROSS-EXAMINATION

BY MR. FLEISCHMAN: [SIC]

* * *

[Vol. 3, 433] Q And will you tell us the circumstances under which you initialed and dated the said envelope?

A I dated this at the time when the postal inspector came to my home.

Q What Postal Inspector?

A The Postal Inspector from the Regional Area of Altoona, Pennsylvania.

Q What is his name, if you know?

A A Mr. Hall.

Q Do you know the circumstances under which he happened to come to your home?

A I filed a complaint after receiving it.

Q And the complaint was, you stated, you did not want to receive any further mail from Library Services: Is that the fact?

A Yes, sir.

Q And it is a fact, is it not, that you never received any other mail from Library Services thereafter, did you?

A I have not.

* * *

[Vol. 3, 435] MORRIS MENDELSOHN,

* * *

[Vol. 3, 436] DIRECT EXAMINATION BY MR. McCORRISTON:

* * *

Q I am now going to show you an envelope marked Government's 16 and ask you if you can identify it, sir?

A Yes, I can.

Q How can you identify those materials?

A This was sent to me in the mail. I can identify it by its appearance and also by the fact that I have initialed it and dated it.

Q Do you recall what company, if any, sent those materials to your home?

A Yes. Library Service.

Q Did you ever solicit those materials or [Vol. 3, 437] any other materials from Library Services?

A No.

* * *

CROSS-EXAMINATION

BY MR. FLEISCHMAN: [SIC]

* * *

[Vol. 3, 438] Q Now, I take it that you also asked the Post Office to issue a Prohibitory Order so that you would not receive any further mail from Library Services; it that correct?

A Yes.

Q And it is a fact, is it not, that you never again received any mail of any kind from Library Services after making that application, that is the fact, is it not?

A Yes.

* * *

[Vol. 3, 442] Mr. Fleischman: While we are here, I neglected to ask the prior witnesses on the stand their ages. May it be stipulated before they leave, so I don't have to call them back, that all of them—

Mr. Butcher: We stipulate they are all adults.

Mr. Fleischman:—That they were all adults. I had missed asking until I go—

The Court: Do you want to stipulate before the jury or just on the record here.

[Vol. 3, 443] Mr. Fleischman: I would like to stipulate before the jury, if the Court please, with regard to the witnesses.

The Court: They can observe it.

Mr. Fleischman: I will take it for the record; the record satisfies me, Your Honor.

Mr. Katz: But there is a stipulation on the record that they are all adults.

The Court: Absolutely.

* * *

[Vol. 3, 445] WILLIAM J. DAMMANN

* * *

DIRECT EXAMINATION

BY MR. BUTCHER:

* * *

[Vol. 3, 446] Q Mr. Dammann, I will hand you what has been marked—

Mr. Butcher: If I might approach the witness—

The Court: Yes.

Q —Government's Exhibit 8 and ask you to identify it if you can.

A Yes, sir.

Q Have you ever had that material in your possession before?

A Yes, sir, I received it in the mail.

Q About what time?

A Well, I think it was about the 16th of January. As I recall, it was on a Saturday and I turned it in to the Post Master on Monday.

Q Do you recall the name of the company that appears on the advertising brochure or on the materials enclosed in that exhibit?

A No, I couldn't have until just now seen it in there. I had forgot the name.

Q All right. Having seen that what was the name you saw?

A Library Services.

Q Let me ask you this, have you ever solicited [Vol. 3, 447] from Library Services that advertisement or any other advertisement from that company of that nature?

A No, sir.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

* * *

Q After you received the brochure, you had occasion to initial the outer envelope and date it, did you not?

A Yes, sir.

Q And was that when the Postal Inspector got your initials and the date when you were making an [Vol. 3, 448] application for a Prohibitory Order, is that what happened?

A This was a couple of months later, yes, sir.

Q Well, if you look at it I think you will find it wasn't that old.

A No, it is dated the 18th. That was the date I turned it in.

Q Yes. Then what happened? On the 13th, is that when you initialed it?

A I initialed it and I marked it 1/18/71. That was the date that I turned it in to the Post Master.

Q And when you turned it in you turned it in for the purpose of getting an order asking Library Services not to send you any more mail, isn't that right?

A Well, as I understand it, that was the procedure to follow, if you didn't want any more of this type of mail and I gave it to the Post Master.

* * *

[Vol. 3, 450] Q And the fact is, is it not, Mr. Dammann, that thereafter you never received any mail of any kind from Library Services, isn't that the fact?

A That is true.

* * *

[Vol. 3, 452] DENNIS C. LINDELL

* * *

[Vol. 3, 453] Q Mr. Lindell, I hand you Government's Exhibit 5 for identification and ask you to identify it if you can.

A Yes, I can identify it.

Q Has that material ever been in your possession prior to today?

A Yes, it has.

Q Do you recall the name of the company appearing on the contents of that Exhibit?

A Library Services.

Q Did you solicit that piece of material from Library Services?

A No, sir.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

[Vol. 3, 454] Q I take it when you received the advertisement you got in touch with the Post Office Department, did you?

A Yes, sir.

Q And you also asked for an order from the Post Office Department requesting that Library Service not send you any further mail, isn't that a fact?

A Yes, sir.

Q And thereafter you never received any other mail from Library Service of any kind, did you?

A No, sir.

* * *

[Vol. 3, 455] ELSA MEYERHOFF

* * *

[Vol. 3, 456] Q Mrs. Meyerhoff, Government's Exhibit 10 has been placed before you.

A Yes.

Q I will ask you to identify it if you can.

A Yes, I can.

Q Has that piece of evidence ever been in your possession prior to today?

A Yes.

Q When might that have been?

A In January of '71.

Q And where did you find that piece of evidence originally?

A In my mailbox.

* * *

[Vol. 3, 458] Q Mrs. Meyerhoff, did you personally ever solicit that material from the Library Services?

* * *

A No. No, I did not.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

* * *

[Vol. 3, 459] Q Did you file an order—did you ask the Post Office Department to ask Library Services not to send you any further mail?

A. That is right.

Q You did?

A Yes.

Q Did you sign it?

A Yes.

* * *

[Vol. 3, 461] Q My question is, do you recall receiving any more mail from Library Services?

A No, I do not.

* * *

[Vol. 3, 463] ALFRED MEYERHOFF

* * *

[Vol. 3, 464] Q (BY MR. BUTCHER) Mr. Meyerhoff, have you ever heard of a company called Library Services, Inc.?

A Yes, I have.

Q Have you ever solicited anything at all from that Company?

A No.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

Q Mr. Meyerhoff, after the application to the Post Office Department was made requesting Library Service not to send you any further mail, [Vol. 3, 465] do you recall receiving any further mail from Library Services?

A I am not sure of that.

Q You don't have any recall of having seen anything from Library Services?

A I can't tell.

Q I take it what you are saying is you received some further mail but you don't know from whom you received it; is that the fact?

A That is correct.

Q When you received this further mail did you turn it in to the Post Office Department?

A No.

* * *

[Vol. 3, 467] VICTOR N. LA MARIE

DIRECT EXAMINATION

BY MR. BUTCHER:

* * *

[Vol. 3, 468] Q But insofar as that particular piece of evidence is concerned, is this the first time that you have ever seen that particular piece of evidence?

A No, I seen it in January.

January of when, sir?

A '71. Well, I got it just prior to January—I mean January 16 of '71.

Q Where did you find that particular piece of evidence?

You say you got it.

A It was in my mailbox.

Q All right.

Did you open it yourself?

[Vol. 3, 469] A I did.

Q Have you ever heard of a company called Library Service, Inc?

A No, I never did.

Q Have you ever solicited anything at all from Library Service, Inc.?

A Not to my knowledge, no. I know, not Library. I remember that name, no.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

* * *

[Vol. 3, 470] Q I take it that you also requested the Post Office Department to ask Library Services not to send you any more mail, is that correct?

A I did.

Q And Library Services has complied; you have not received any further mail from them at all, have you?

A Not from Library Service.

* * *

[Vol. 3, 471] ROBERT REINKE

* * *

DIRECT EXAMINATION

BY MR. McCORRISTON:

* * *

[Vol. 3, 472] Q Mr. Reinke, I am going to ask you if you can identify what we have marked as Government's Exhibit 17. Can you identify that, sir.

A Yes.

Q How can you make that identification?

A It bears my initials. All three parts of the document—Exhibit—bear my initial and a date which I wrote on there.

Q How do those materials come into your possession?

A They were received through the United States Mails at my home.

Q At the address you have previously stated?

A Yes, that is correct.

Q And sir, can you recall from your independent recollection what company you received those materials from?

* * *

[Vol. 3, 473] A Library Services.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

Q Mr. Reinke, I take it that you asked the Postal Department to ask Library Service not to send you any more mail, is that correct?

* * *

A Yes, I did.

Q And thereafter you never received any further mail from Library Service, did you?

[Vol. 3, 474] A That is right. I have no present recollection of receiving any other mail from Library Services.

* * *

[Vol. 3, 477] CHARLES C. HAZLETT

* * *

[Vol. 3, 478] DIRECT EXAMINATION

BY MR. BUTCHER:

* * *

Q (BY MR. BUTCHER) I hand you Government's Exhibit 3 for identification and ask you to examine it.

A Yes, sir.

Q Mr. Hazlett, have you ever had that material in your possession prior to today?

A When I got it.

* * *

[Vol. 3, 479] Q Mr. Hazlett, are you familiar with the company called Library Service, Inc.?

A No, sir. The only time I have ever seen it was right here.

Q Have you ever ordered anything either this particular item or any material of any kind from Library Services in the past?

A No, sir.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

* * *

[Vol. 3, 480] Q Whose idea was it to ask the Post Office Department to ask Library Services not to send you any further mailings?

A It was mine.

Q And after you asked the Post Office Department to make that request of Library Services, so far as you know that was fully complied with, isn't that right?

A No, sir.

* * *

Q Well, just a minute. Did you ever see any mail from Library Services after that—you, personally?

[Vol. 3, 481] A No, sir. I haven't.

Q You did not.

A No.

* * *

[Vol. 3, 483] ENOCH L. JAMES

* * *

DIRECT EXAMINATION

* * *

[Vol. 3, 484] Mr. Butcher: If I might approach the witness.

The Court: Yes.

Q Mr. James, I will hand you Government's Exhibit 7 for identification and ask you to examine it, please. Have you ever seen that advertisement, that evidence prior to today?

A Yes, I saw it when I received it and I saw it when the Inspector came to see me with it.

Q All right. You received it, you say. You received it how?

A In the mail box, U.S. Mail.

* * *

[Vol. 3, 485] Q Had you, prior to the receipt of this advertisement, ever received or solicited anything including that advertisement or anything else from Library Service, Inc.?

A No.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

Q Mr. James, after you received the envelope containing the advertisement, tell us what you did, please.

A I went to the Post Office and obtained a form. I don't know the number. I took it home with me and filled it out and returned it to the [Vol. 3, 486] Post Office with this material.

Q And in the form you asked the Post Office Department to ask Library Services not to send you any more mail, is that the fact?

A That would be correct, yes.

Q And you never received any further mail from Library Services thereafter, did you?

A Not to my knowledge.

* * *

[Vol. 3, 488] DAVID L. SNELL

* * *

DIRECT EXAMINATION

BY MR. McCORRISTON:

* * *

Q Mr. Snell, at this time I will ask you if you can identify the envelope we have previously marked as Government's Exhibit 9.

A Yes, sir.

Q How can you make that identification, sir?

A By the initials and the date that I put on here of January 19 of '71.

Q Sir, do you recall the name of the company that sent you that mail?

[Vol. 3, 489] A Library Services.

Q Sir, at that time or any other time had you solicited anything from that company?

A I have not.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

Q Now did you go to the Post Office Department also after receipt of the advertisement and ask that you get an order to the Library Services that you should not receive any more mail from them?

A That is correct.

Q And thereafter you did not receive any more mail from Library Service?

A I did not.

* * *

[Vol. 3, 491] ALLAN CREPEAU

* * *

[Vol. 3, 492] DIRECT EXAMINATION

By MR. McCORRISTON:

* * *

Q All right, Mr. Crepeau, I will hand to you an envelope we have marked for identification as Government's Exhibit Number 11 and ask you if you can identify that.

A I can.

Q How can you make that identification?

A Well, a number of ways. First, it is addressed to me and I initialed it. This is my initial, on January 15, 1971.

I specifically remember the headline, *The Illustrated Presidential Report of the Commission on Obscenity* and the return address on the envelope, [Vol. 3, 493] Library Service, Inc.

Q Sir, did you solicit that particular advertisement from Library Services, Inc.?

A I did not.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

* * *

Q After you received the mailing I take it that [Vol. 3, 494] you asked the Post Office Department to ask Library Service not to send you any more mail, is that right?

A I took this piece of literature to the Post Office Department, asked them what I could do to keep it from coming into my house, and they gave me a form which I completed.

Q And that form, to the best of your recollection, requested the Post Office Department to ask Library Service not to send you any more mail, isn't that the fact?

A To the best of my recollection.

Q And the fact is, is it not, that thereafter you never again received any mail from Library Service?

A Not to my knowledge—recollection.

* * *

[Vol. 3, 496] A. KENNETH SIVITZ

* * *

DIRECT EXAMINATION

BY MR. McCORRISTON:

* * *

[Vol. 3, 497] Q All right, Mr. Sivitz. I am going to show you the envelope we have previously marked for identification as Government's 12 and ask you, sir, if you can identify that.

A Yes, I can.

* * *

Q And how did you first receive that into your possession?

A Through the mailbox.

[Vol. 3, 498] Q Through the United States mails?

A United States mail.

Q Sir, do you recall what company sent that piece of mail to you?

A Library Services.

Q Did you solicit that mail from Library Services?

A I did not.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

* * *

Q When you received this mail you asked the Post Office Department to ask Library Service not to send you any more mail, is that the fact?

A I signed a prohibitory notice. I did.

Q That Prohibitory Notice was asking the Library not to send any more mail, is that right?

A That is correct.

Q And in fact you never received any more [Vol. 3, 499] mail from Library Service, isn't that correct?

A I have not.

* * *

VOL. 4.

[Vol. 4, 665] RICHARD HARTE,

* * *

DIRECT EXAMINATION

BY MR. BUTCHER:

Q. Mr. Harte, where is your residence, sir?

A. My home residence, you are speaking of?

Q. That is correct.

A. 10545 McBloom Street, Sunland, California.

[Vol. 4, 666] Q. Is this a suburb of Los Angeles?

A. This is a suburb of Los Angeles, yes, sir.

Q. Are you presently employed?

A. Self-employed, sir.

Q. What is the name of your firm?

A. Academy Addressing and Mailing.

Q. What is the address of that firm?

A. 12117 Vanowen, North Hollywood.

Q. And very briefly, would you explain to the members of the jury what the nature of the business of Academy Addressing and Mailing Service is.

A. We perform a service for people who wish to have commercial mailings or mailings of any type done. That is inserting letters, brochures, or stuff like that into envelopes.

Q. Included in that service, does your firm ever have occasion to mail out adult sexually oriented material?

A. Well, I guess you could—yes, in a roundabout sort of way. We don't exactly mail books or anything like that; we haven't. We just mail brochures and stuff like that, advertising books for sale.

Q. What would be the percentage?

A. Oh, no more than five or ten percent of my actual business.

[Vol. 4, 667] Q. That would be what? The sexually oriented or the other?

A. Well, I guess you would call it sexually oriented material.

Q. Mr. Harte, are you familiar with a company called Regent House?

A. Yes, sir.

Q. And where are they located?

A. I couldn't give you the address. I know it is on Varner Street in North Hollywood.

Q. North Hollywood?

A. Yes, sir.

Q. Do you know anyone at Regent House named Bernard Lieberman?

A. I know the name of Lieberman now. I never knew it before. I knew it only as Bernard.

Q. Bernard?

A. Bernie, as I called it.

Q. Did you at any time in the month of January '71—did you ever have a conversation with a person you know as Bernie?

A. Yes, Bernard called me on the phone.

* * *

[Vol. 4, 696] Q. Subsequent to the receipt of that telephone [Vol. 4, 697] conversation with Bernard Lieberman, did you have occasion to perform a business service of any kind for Regent House, Inc.?

* * *

Q. Did your firm perform any service?

A. Yes, we did.

Q. What was that service?

A. Insertion of brochures and return envelope into an outside envelope and sealed.

Q. Approximately how many were there, sir?

A. Roughly, to my knowledge, now, 55,000-58,000.

Mr. Butcher: If I might approach the witness?

The Court: Yes.

BY MR. BUTCHER:

Q. I hand you what has been marked Government's Exhibit 2 and contents and ask you to examine it for a moment and the contents—I ask you to examine it for a moment, and the contents, please, these some 50-55 or 58,000 advertisements, whatever your figure was. I ask you to closely examine Exhibit 2-A and tell me if that [Vol. 4, 698] was or was not identical to those advertisements?

* * *

The Witness: Yes, sir.

BY MR. BUTCHER:

Q. Mr. Harte, after your firm had stuffed—I guess —Is that the term?

A. Yes, sir.

Q. Exactly what is that, please?

A. Well, we have a machine they call a Follsberg Inserter. It stuffs pieces of mail into an envelope and seals it.

Q. Did your firm have occasion to affix postage of any kind—

A. Yes, sir.

Q. (Continuing)—to the exhibits and did you use your own firm's meter head for that?

A. No, sir.

Q. Where did you get the meter head?

A. The meter head was brought at the same time that the brochures and the envelopes and the rest of the stuff was brought over and used on my machine.

[Vol. 4, 699] Q. Okay.

Do you have any first-hand knowledge as to who owned the meter head?

* * *

The Witness: Yes.

* * *

Q. Who owns the meter head, sir?

A. Regent House.

Q. Now, then, did you then deposit—well, let me ask you, have we finished the operation? They are stuffed and affixed postage.

Now did you then deposit the items in the mail yourself?

A. No, sir, I did not.

Q. Do you know what happened to the items?

A. Yes, sir.

[Vol. 4, 700] Q. Did someone come and get them?

A. Yes, sir, they did.

Q. And you probably have no idea of what happened after that?

A. No. Once they leave my place, that is it.

Q. Fine. Thank you.

One last question, Mr. Harte: What about payment for this particular operation? Do you know anything about that?

A. My wife takes care of that service.

Mr. Butcher: Thank you.

Your witness.

CROSS-EXAMINATION

BY MR. FLEISHMAN:

Q. Mr. Harte, you have been named as a co-conspirator in this case. You were aware of that, is that correct?

A. Yes, sir.

Q. And was any promise made to you in connection with the testimony you are giving here by the Government—any promise given by the Government?

A. No, sir.

Q. Did you ever enter into any agreement with any of the other persons named herein to enter into an [Vol. 4, 701] agreement to do something that you thought was unlawful?

Mr. Butcher: Objection as being immaterial, your Honor.

The Court: Sustained as to what he thought.

BY MR. FLEISHMAN:

Q. Have you ever met Mr. Hamling?

A. No, sir.

Q. Have you ever had any conversations with him?

A. No, sir.

Q. Of your own knowledge you don't know anything about who runs Library Services, do you?

A. No, sir, I don't.

Q. Or Reed Enterprises?

A. No, sir.

Q. Or Greenleaf Classics?

A. No, sir.

Q. You never had any agreements with them at all, did you?

A. No way.

Q. No discussions?

A. No agreements, no, sir.

Q. Now, as I understand it, the person that you dealt with in connection with the brochure is a person who you knew by the name of Bernie, is that right?

[Vol. 4, 702] A. Yes, sir.

Q. You didn't know his last name even at the time that you—

A. (Interposing) No, sir.

Q. (Continuing)—did business with him, is that right?

A. No, sir.

* * *

[Vol. 4, 708] Q. Now at the present time do you know what, if any, position this Bernie Lieberman has with Regent House?

A. Yes, sir.

Q. What is his position, do you know?

A. Warehouseman, as I found out recently.

Q. Warehouseman?

A. Warehouseman.

* * *

CROSS-EXAMINATION

BY MR. KATZ:

Q. Mr. Harte, looking at the four people sitting at the defense counsel table, have you ever seen any of them before you came to court?

A. No, sir, I have not.

Q. Have you ever had any dealings with Earl [Vol. 4, 709] Kemp?

A. No, sir.

Q. Shirley Wright?

A. No, sir.

Q. David Thomas?

A. No, sir.

* * *

[Vol. 4, 710] Q. In connection with the particular mailing where you have been shown Government's Exhibit 2, besides the material that Mr. Lieberman spoke to you about and the material that Regent House sent over to you, has anyone else sent you any of that material to be mailed out?

A. This specific one, sir?

Q. Yes.

A. No.

Q. If I understood your testimony, Mr. Harte, as far as the Government's 2 and the advertisement [Vol. 3, 711] advertising the illustrated Presidential Report of the Commission on Obscenity and Pornography, your only dealings regarding that mailing and that stuff was with Regent House, is that right, sir?

A. Yes.

* * *

[Vol. 4, 712] VENITA HARTE,

* * *

DIRECT EXAMINATION

BY MR. BUTCHER:

Q. Mrs. Harte, are you affiliated in any way with Academy Addressing and Mailing Service?

A. I am.

Q. You saw the previous witness testify. Is that your husband?

A. It is.

Mr. Butcher: If I might approach the witness?

The Court: Yes.

BY MR. BUTCHER:

Q. I show you what has been marked Government's Exhibit 25 for identification and ask you to examine it [Vol. 4, 713] for a moment, please. Would you briefly describe what it is generally.

* * *

Q. Mrs. Harte, you have had occasion to [Vol. 4, 714] examine that document in front of you, bearing Exhibit No. 25, have you not?

A. Yes, sir.

Q. Generally, describe what it is.

A. It is my invoice for services performed.

Q. Did you personally prepare that document?

A. I did.

Q. The amount shown on the document, total billing?

A. $541.15.

Mr. Katz: We can't hear the witness or the counsel.

The Witness: $541.15.

The Court: What number Exhibit is that, Mrs. Harte?

The Witness: 25.

Mr. Katz: What is that exhibit number?

The Court: G-25, Government's 25.

BY MR. BUTCHER:

Q. Mrs. Harte, do you have any firsthand knowledge of the nature of the service your company performed in order to warrant that $541.15?

A. We do a complete mailing service.

Q. And who was the person for whom that service was performed?

A. That was billed to Regent House.

[Vol. 4, 715] Q. In what city?

A. North Hollywood.

Q. Did you ever see the materials upon the completion of the service you had performed such as the stuffing of the envelopes, the affixing of the postage?

A. I did.

Q. Did you personally deposit them in the mail?

A. I did not.

* * *

Q. Let me ask you this. Are they in your concern this day?

A. No, sir. They were picked up.

* * *

[Vol. 4, 717] CROSS-EXAMINATION

BY MR. KATZ:

* * *

[Vol. 4, 719] Q. Have you ever had any business dealings with a man named Earl Kemp?

A. No, sir.

Q. Shirley Wright?

A. No, sir.

Q. David Thomas?

A. No, sir.

[Vol 4, 720] Q. To your knowledge in connection with the particular billing you have in front of you, which is Government's Exhibit 25, did you have any business dealings with Reed Enterprises, Greenleaf Classics or Library Service?

A. No, sir.

Q. Then the only contact you had was with Regent House, is that correct?

A. Yes, sir.

Q. And they paid you for the services you performed?

A. That is right.

Q. And aside from the fact that someone—I will go back.

Were you aware that someone had called you to tell you they were going to send this material over?

A. They had contacted my husband.

Q. All right. And the person who contacted your husband, did that person ever talk to you or did you have any conversation with anyone at Regent House regarding delivery of this material?

A. No, not until it came in. When the material arrived, I mean—that this is the place it was from, my husband told me.

Q. I am sorry, I didn't make it clear.

[Vol. 4, 721] Did you have any personal contact with anyone at Regent House regarding this mailing?

A. I don't believe so, no.

Q. Just so we are clear, you handled this the same as you have handled all other mailing that came into your service to operate, is that right?

A. Yes, sir.

Q. And when the mailing was finished do you know how the people at Regent House or someone was notified that it was completed?

A. They were probably called and said it was completed.

Q. And you don't recall whether you called them or your husband?

A. My husband did, I believe.

Q. So then you personally had no contact with anyone from Regent House or from any of the people that I have mentioned except to send them a bill and get a check back, is that right?

A. That is right.

* * *

VOL. 5.

[Vol. 5, 773] JAMES FERNANDEZ,

* * *

DIRECT EXAMINATION

BY MR. BUTCHER:

Mr. Fernandez, by whom are you employed, sir?

A. Pitney-Bowes.

Q. What is the general nature of their business?

A. We sell all types of mailing equipment.

Q. If I might approach the witness—I hand you what has been marked Government's Exhibit 40-A, 40-B and 40-C for identification purposes.

Have you had a chance to examine it, sir?

A. Yes, sir.

Q. And 40-A is what?

A 40-A is a postage meter rental agreement.

Q. And that was dated when, sir?

A. It was dated 9/17/69.

[Vol. 5, 774] Q. Were you present at the time that agreement was drawn up and executed?

A. Yes, sir.

Q. Where did this take place, please? Where did the execution of this agreement take place, sir?

A. I don't know the correct number, but it was in the building on Camino del Rio.

Q And what business establishment were you in in that building?

A. It was an office building.

Q. An office building. Whose office, what company name, sir?

A. There was quite a number of companies in the building.

Q. Did you sign that agreement at the time?

A. I certainly did.

Q. Did anyone else sign that agreement at the time?

A. Yes, Mr. Thomas.

Q. Do you know who Mr. Thomas is?

A. Yes, sir.

Q. What is his full name, if you know?

A. I don't know his full name. I just know him as Mr. Thomas.

Q. Do you see him in court today?

[Vol. 5, 775] A. Yes, sir.

* * *

Q. At the time Mr. Thomas signed that Pitney-Bowes meter rental agreement in your presence, did he give you any specific directions with what to do with the Pitney-Bowes meter head?

A. Yes, sir.

Q. And what were those directions?

A. To install the meter head at Library Services, Inc., 7525 Raytheon Street, San Diego.

Q. Is that an address other than the one you were in at the time?

A. Yes.

* * *

[Vol. 5, 776] Q. What is in the building? Have you ever been inside it?

A. Yes, I went inside. There was nothing, sir, in the building except a mailing machine.

* * *

[Vol. 5, 787] ALBERTA C. HOLMSTROM,

* * *

[Vol. 5, 788] DIRECT EXAMINATION

BY MR. BUTCHER:

Q. Where do you live?

A. 1942 Eldora Street, Lemon Grove.

Q. And where are you employed?

A. San Diego City, Treasurer's Office.

Q. Mrs. Holmstrom, are records kept at the Recorder's Office evidencing the everyday transactions of the Treasurer's Office?

A. I am in the Licensing Division where they sell business licenses.

Q. Right. Well, specifically related to the Business License Division?

A. Yes, sir.

* * *

[Vol. 5, 792] Q. And what is that, please?

A. It is an application for a business license.

Q. Do there appear to be any signatures on that application?

A. Yes, sir.

Q. Can you read what that signature appears to say?

* * *

Q. Can you read what that name appears to be?

A. It looks like D. Thomas.

Q. Pardon me?

A. It looks like D. Thomas.

Q. As to 41-E, can you tell us what that is?

A. It is a change of a location for a business application, business license application.

Q. Do you see any signatures on that?

A. I can see it, but it is very hard to read.

* * *

[Vol. 5, 799] WILLIAM E. DAVIS,

* * *

DIRECT EXAMINATION

BY MR. BUTCHER:

Q. Mr. Davis, where do you live, sir?

A. 2130 Palm Avenue, National City, California.

Q. You are employed by whom?

A. Bank of America, University-Highland Branch, 4444 University Avenue.

Q. Mr. Davis, I will hand you what has been previously marked for identification as Government's [Vol. 5, 800] 42, 43, and 44 for identification and ask you to examine them, please. What, generally, are those documents, sir?

A. Signature cards for checking accounts.

* * *

Now with respect specifically to Government's Exhibit 42, what is the name of the company involved? [Vol. 5, 801] Who signed for that card, sir, or the company name shown on that card?

A. Reed Enterprises, Inc.

Q. And could you tell us who the authorized signatures for that card are?

A. Shown on here?

Q. Yes, for that account.

A. William L. Hamling, authorized signature.

Q. Is that the only authorized signatures on 42?

A. No, we have a signature of the secretary, Shirley Wright.

Q. Set that aside, please, and take a look at No. 43, if you would.

As to 43, what is the name of the company involved, sir? Can you see the name of any business concern?

A. Greenleaf Classics, Inc.

Q. Authorized signatures are whose, sir?

A. William L. Hamling and Shirley R. Wright.

Q. As to Exhibit 44, would you tell us the name of the company there.

A. Library Service, Inc.

Q. Can you tell us who the authorized signatures for that exhibit are.

[Vol. 5, 802] A. William L. Hamling and D. L. Thomas.

* * *

VOL. 6.

[Vol. 6, 1037] MASAAKI HIRONAKA

* * *

[Vol. 6, 1037] DIRECT EXAMINATION

BY MR. BUTCHER:

Q. Mr. Hironaka, where do you live, sir?

A. I live at 2640 National Avenue, San Diego.

Q. And by whom are you employed?

A. I am employed by the United States Post Office at San Diego.

Q. Any specific substation or branch?

A. I am Superintendent of Pacific Beach Post Office.

Q. Mr. Hironaka, directing your attention to October of 1970, were you so employed at that location?

A. No. In September of 1970 I was Superintendent of the Grantville Station.

* * *

[Vol. 6, 1039] Q. Mr. Hironaka, in September of 1970, and with respect to the following three post office boxes, did you engage in any activity whatsoever relative to these three boxes?

[Vol. 6, 1040] A. Yes, I did. I received a —

Q. Mr. Hironaka, we won't inquire as to what you received. I will just ask you what you did relative to these boxes.

A. Relative to the boxes?

Q. Did you have any occasion to inquire of anyone about these post office boxes I just gave you?

A. Yes, I made inquiry.

Q. Where did you make such inquiry? At what location, sir?

A. This would be at 3511 Camino Del Rio South.

Q. What is located at that address?

A. That is the Mission Square Building which houses Reed Enterprises.

Q. Anyone else? Any other companies?

A. Library Services and Greenleaf Classics.

Q. When you made this visit out there did you have occasion to speak to any individuals at that address?

A. Yes, I was able to speak with a Shirley Wright.

* * *

[Vol. 6, 1041] Q. Mr. Hironaka on that occasion did you take any Post Office Department official forms with you at the time?

A. Yes, I did. I took three blank application forms. I think it is 1093.

Q. Any others?

A. And the old orders, the old applications which were for the three boxes.

* * *

[Vol. 6, 1042] Q. And that is what you have previously described as what, sir?

A. That is the box application for Post Office Box 20036.

Q. The name of the company involved there?

A. Reed Enterprises.

* * *

Q. Were you present when any signatures were affixed to that card?

A. Yes.

Q. And who was it that signed the card, sir?

A. Shirley R. Wright.

Q. In your presence?

A. Yes, sir.

Q. Now then, when did that occur?

A. That occurred on the 10th — the 7th of October, 1970.

[Vol. 6, 1043] Q. All right. Now drop down, if you would, to Exhibit 39-A. What is that document, sir?

A. That document is the standing delivery order.

Q. Relating to what post office box?

A. Relating to Box 20035.

Q. Now then, were you present when anyone — if anyone — affixed their signature to that card?

A. Yes, I was.

Q. Specifically inviting your attention to the second line of the card where it says, "Signature of Person Signing the Order"?

A. Yes.

Q. Who signed that, sir?

A. Shirley R. Wright.

Q. All right. Thank you. And that was on what day?

A. That was on October 7, 1970.

Q. All right. Incidentally, who typed out these two documents, if you know?

A. This was typed on the typewriter in the office of Shirley R. Wright.

Q. By her?

A. By her.

Q. Now let's go to Exhibit 39-B, which will be [Vol. 6, 1044] the lower one, the smaller card, Mr. Hironaka. 39-B is what?

A. The standing delivery order for Greenleaf Classics.

Q. Post Office Box No. —.

A. Post Office Box 20194.

Q. And was that document typed by anyone in your presence?

A. Yes, it was typed also by Shirley R. Wright.

Q. Now let's look at 38-B. Just describe the nature of that. What form is that, please?

A. This is a POD Form 1093, Box Application for P. O. Box 20194.

Q. Does that one relate to 39-B? Is that the idea?

A. Yes, it does.

Q. Same box number?

A. Yes.

Q. Now when was the application on that one?

A. This was an original box application of August 6, 1965.

Q. Thank you, sir. Now let's go to the one in the upper right which is Exhibit 38-C, if you will confirm that please.

A. Yes.

[Vol. 6, 1045] Q. On the back of the exhibit. Make sure it is marked that way.

A. 38-C.

Q. And the name of the company?

A. This is the box application for P.O. Box 20308 for Library Services, Inc.

Q. Now then, let me ask you this: Was this application also filled out as part of this transaction on 38-B, 39-B — I am sorry, 38-A, 39-A and 39-B that you described as having occurred on October 7, 1970?

A. Yes, it was.

Q. Now, did Mrs. Wright sign that card?

A. No, she did not sign this card.

Q. There is a signature there, though, correct?

A. There is a signature, yes.

Q. Were you present when that signature was affixed?

A. No, I was not present at the time.

Q. Would you explain to the jury the circumstances by which that signature was affixed, to the best of your knowledge.

A. To the best of my knowledge —

MR. KATZ: I am going to object to this.

[Vol. 6, 1046] BY MR. BUTCHER:

Q. Limiting it to what you actually saw.

MR. KATZ: Your Honor, if the witness said he didn't actually see it signed, I believe it would be irrelevant and calling for a conclusion of this witness.

THE COURT: Overruled. He can testify as to what he saw with respect to the document.

THE WITNESS: I had presented the blank application form to Mrs. Wright with request to up-date the information for the application of Library Services. As she did not readily know the exact person or persons she had taken the form out and made inquiries and then came back with a filled form with the signature on the card.

BY MR. BUTCHER:

Q. All right. Let's talk a minute about 39-C, the 3801 form. Did that leave your sight in an unsigned state and return in a signed state?

A. No, this card was signed in my presence.

Q. Oh, I see. Well, then, I am sorry. Let's go back to 39-C. Now then, once that card was brought back to you in a signed condition, what, then, did you do, if anything?

A. I requested that the signer submit identification which I had to see in order to put down the [Vol. 6, 1047] identification at the top of this form.

Q. I see. And what was the nature of that identification, just in general terms?

A. It was a California Driver's License.

Q. All right. Now then —

MR. KATZ: Your Honor, I would object to counsel approaching the witness with the exhibit. There has been no foundation laid that the exhibit is in any way known to the witness.

THE COURT: Lay a foundation.

MR. BUTCHER: I am going to approach the witness.

MR. KATZ: I object. It is in effect leading the witness.

THE COURT: Lay a foundation with respect to what you are about to show.

BY MR. BUTCHER:

Q. Mr. Hironaka, now did someone appear to present identification to you pursuant to your request?

A. Yes, Mr. Kemp came in and presented his driver's license.

Q. Do you know Mr. Kemp on sight?

A. Mr. Kemp is the gentleman sitting at the table with the beard.

MR. BUTCHER: All right. Let the record so indicate.

[Vol. 6, 1048] THE COURT: The record may indicate the witness has identified Mr. Kemp.

BY MR. BUTCHER:

Q. And, Mr. Hironaka, if you would take a look at 38-C, is that your form at the right on the top?

THE COURT: Excuse me. I notice there is another beard at the counsel table. Which man with the beard?

THE WITNESS: The man on the right; on my right.

THE COURT: Very well.

BY MR. BUTCHER:

Q. Taking a look at Exhibit 38-C, Mr. Hironaka, did you affix any identification numbers to that document?

A. I affixed the driver's license number R385093, California, expiring in 1971.

MR. BUTCHER: If I might approach the witness.

THE COURT: Yes.

BY MR. BUTCHER:

Q. Mr. Hironaka, I will hand you what has been marked for identification as Government's Exhibit 38-D and ask you to identify it, if you can, or let me ask you this: Have you ever seen that document or any document identical to it at any time in the past?

[Vol. 6, 1049] A. This appears to be a copy of the California driver's license.

MR. KATZ: Just a minute. I am going to object. It isn't responsive. The question was: Have you ever seen that document or any one like it?

THE COURT: Sustained.

MR. KATZ: Move the answer be stricken.

THE COURT: It will be stricken.

BY MR. BUTCHER:

Q. Have you ever seen that document or any document identical to it at any time in the past? Yes or no. Either that one or an identical document to it?

A. Yes.

Q. When might that have been?

A. That would be on October 7 at the time I saw Mr. Kemp.

Q. Now then, with respect to 39-C, that signature of Earl Kemp — let me say this. On the second line I will invite your attention to the name Earl Kemp.

A. Yes.

Q. Was that signature following that name signed in your presence?

A. Yes, it was.

[Vol. 6, 1050] Q. And by whom, sir?

A. By Mr. Earl Kemp.

* * *

[Vol. 6, 1058] Q. Is it correct to say, Mr. Hironaka, that the only reason you went out to 3511 Camino Del Rio South to have new applications signed was because you had received a letter from Mr. Schoof to Mr. Ebbing to have you have an officer sign for those boxes?

Q. Do you understand the question, sir?

A. Yes.

Q. And the answer is yes?

A. Yes.

* * *

[Vol. 6, 1065] Q. Did anybody tell you that Shirley R. Wright was the secretary of Greenleaf Classics?

* * *

Q. Did anyone tell you that, sir?

A. At the time that I wished to up-date this particular document, I requested Shirley Wright her connection with Greenleaf Classics, at which time she told me that she was Secretary-Treasurer, later changed to secretary.

Q. And did you ask her about any other individuals and their possible relationship with Greenleaf Classics, Inc.?

A. Yes, I attempted to get the other names and she did give me the name of President William Hamling and Vice-President Earl Kemp.

Q. Now, looking at Exhibit 38-C, about half way down the Exhibit, Signature of Applicant, and there is a signature and behind it in capital letters, "V.P." [Vol. 6, 1066] and the same appears at the bottom of 38-C behind the signature or the marking on the line, "Signature of Applicant." Did you put those in, as I understand?

A. Yes, I did.

Q. And did anyone tell you that Earl Kemp was Vice-President of Library Services?

MR. KATZ: Objection to that again, your Honor, as calling for hearsay.

THE COURT: Sustained.

BY MR. BUTCHER:

Q. Did Earl Kemp make any specific statement to you regarding any officership he may or may not have held in Library Services?

A. The only thing he stated was that he did not know all of the officers nor his capacity in the various organizations.

Q. All right. Did Shirley Wright make any statement to you with respect to any positions Earl Kemp may or may not have held?

MR. KATZ: Hearsay as to Mr. Kemp, your Honor.

THE COURT: Overruled.

THE WITNESS: The only one that I knew of is that it was determined that she — in conversation between Mr. Kemp and Shirley Wright, that he was Vice-[Vol. 6, 1067] President of Library Services.

Q. You overheard this conversation while you were standing there?

A. While I was standing there they conversed with each other to try to determine the positions of each in Library Services.

* * *

VOL. 10

[Vol. 6, 1506] MELVIN ANCHELL,

* * *

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, took the stand and testified as follows:

THE CLERK: Take the stand, state your full name and spell your last name for the record, please.

[Vol. 10, 1587] DIRECT EXAMINATION

BY MR. BUTCHER:

* * *

[Vol. 10, 1710] Q. Dr. Anchell, I have handed you what has been marked Government's Exhibit 2-A, you may disregard the envelope and contents. Exhibit 2-A — have you seen a copy identical to that, prior to coming to court today?

A. Yes.

Q. Have you had occasion to consider it as a whole?

A. Yes, I have.

Q. Including both sides of the document?

A. Yes, I have seen both sides.

Q. Now, do you have an opinion with respect to whether or not that document has any given dominant theme?

A. Dominant theme?

MR. FLEISHMAN: Excuse me. Just answer yes or no.

BY MR BUTCHER:

Q. Do you have an opinion?

A. Yes.

[Vol. 10, 1711] Q. And could you tell the Court and jury what your opinion as to the dominant theme of Government's Exhibit 2-A would be?

* * *

Q. What is your opinion with respect to the dominant theme of Government's Exhibit 2-A?

A. Pruriency.

* * *

VOL. 11

[Vol. 11, 1729] MR. FLEISHMAN: If the Court please, your Honor will recall at the tail end of the last session I was objecting to the questions. We talked in terms of the appeal of specific pictures to various deviant groups and it was our position that the material, of course, had to be taken as a whole and had to be measured solely by its impact upon the average person.

At this time, your Honor, we respectfully move to strike from the record all of the testimony given by Mr. Anchell with regard to the appeal of the material or portions thereof to deviant groups.

The basis for this motion, your Honor, is twofold. One is constitutionality. The second is the Bill of Particulars which has been submitted by the Government in this case.

* * *

VOL. 13

[Vol. 13, 2222] FRANK GETLEIN,

* * *

DIRECT EXAMINATION

BY MR. BUTCHER:

[Vol. 13, 2369] Q. Thank you, Mr. Getlein. I hand you what has been marked Government's Exhibit 2-A. Have you seen that or an identical advertisement prior to coming to court today?

A. Yes, sir, I have.

Q. And was it the same time we had our conversation relative to Government's 65, was it?

A. Yes, sir.

Q. Have you examined Government's Exhibit 2-A in its entirety?

A. Yes, I have.

Q. All sides? Front? Back? Everything?

A. Yes.

[Vol. 13, 2371] Q. Do you have an opinion whether or not Government's Exhibit 2-a is or is not possessing of any redeeming social value?

A. I do.

Q. And could you give us that opinion?

* * *

Q. What is that opinion, sir?

A. It is that in fact there is no — absolutely no redeeming social significance in this flyer or throw-away mailing piece at all.

Q. Could you give the Court and jury your reasoning underlying that opinion first and then we will go back to the community standards thing.

A. Yes, sir.

* * *

[Vol. 13, 2372] Q. Perhaps Mr. Getlein, it would be easier if we went back and did the community standards issue. Let me ask you first, do you recognize any of the pictures in the advertisement. Have you ever seen those before?

A. Yes, sir.

Q. Where?

A. In Government's Exhibit 65.

[Vol. 13, 2373] Q. In fact — let me ask you this. Do you see any pictures in Government's Exhibit 2-a that did not come from Government's Exhibit 65?

A. No, sir.

Q. Fine. Then let me ask you this. Would your reasoning underlying your conclusions insofar as Government's Exhibit 65 is concerned as to the issue of community standards — would that same reasoning be applicable to Government's Exhibit 2-a?

A. Yes, sir.

Q. Now would you care to elaborate on that if you have any further reasons over and above that which you gave for Government's Exhibit 65?

A. No, they are basically the same reasons.

Q. Now, Mr. Getlein, regarding the question — asking you for further elaboration of your previous statement regarding the absence of redeeming social value, could you give us a few of the reasons for that conclusion, sir?

A. Well, in the first place, the vast majority of — the sheer space on this flyer or throw-away mailing piece comes under the same — comes under everything that has been said about the book because this entire side — one entire side consists of color photos from the book, including the incident of [Vol. 13, 2374] ejaculated sperm on the faces of two girls in a group, including a kind of group lesbian masturbation, including bestiality, sexual relations between a girl and a beast or possibly two beasts — on the one hand. That is one whole side. That is fifty per cent of the piece.

Approximately two-thirds of the other side is simply the title with — subject to what I was saying about simply the jacket, the cover — with the title, with the faint implication that to turn the page and look at these colored pictures of wild sexual activity going on is

somehow patriotic because of the red, white and blue motif on the picked out two-word Illustrated Pornography and the American eagle wing spread overhead.

Of the remaining one-third of one-half of this, one-third of that is a coupon for recipients, presumably to send in their $12.50. One-third is technical instructions to return the coupon and send the $12.50 and one-third — any kind of social value would have to inhere in this, this one-third of one-half of the entire piece.

What this one-third is, is simply a selling piece with kind of a pass at liberty of expression and learning, et cetera, being made very faintly even [Vol. 13, 2375] in that. So that obviously the overwhelming weight of this sales appeal is contained on the illustrated side.

Another point in the relation between this mailing piece and the book, is that all of the illustrations, this whole side, are in fact taken from the color shots so that there is an implication, although it isn't actually stated — in fact it said completely illustrated in black and white and full color but nevertheless there is an implication, since everything you see here is in color, that everything in the book is in color and this in fact is not so. The color is a very small — not a very small part but a minority of the illustrations. Moreover, the illustrations in the throw away are certainly among the more extreme sexual illustrations to be found in the text, including this as I have cited. So therefore, those roughly are the reasons for my opinion.

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VOL. 14

[Vol. 14, 2422] CROSS-EXAMINATION

BY MR. FLEISHMAN:

* * *

VOL. 15

[Vol. 15 2696] BY MR. FLEISHMAN:

Q. Now it is a fact, is it not, Mr. Getlein, that a photograph of a female touching the genitalia of a man is not beyond customary limits of candor merely [Vol. 15, 2697] because that scene is depicted. That is the fact, is it not?

* * *

THE WITNESS: Yes, that is the fact.

BY MR. FLEISHMAN:

Q. So such a picture would be within customary limits of candor, or could be, just that portrayal, right?

* * *

THE WITNESS: As subject matter alone, not necessarily, it seems to me.

BY MR. FLEISHMAN:

Q. Well, when you say not necessarily, that carries with it but also it may, is that right?

A. Yes, depending upon, as with most things in life, depending upon the context in which it appears, what it is intended to mean and what it adds up to as part of a lot of other things adding up to something.

[Vol. 15, 2698] Q. But that picture itself could be, depending upon the context in which it is portrayed—could be within customary limits of candor as you know them, is that right?

A. Also, I just—

Q. Just a minute. First answer, then you can explain all you want, Mr. Getlein.

A. The question is—it could be.

Q. Depending upon the context in which it is found?

A. Correct.

Q. Do you want to explain?

A. Yes, I seem to recall that at that point in my earlier testimony with Mr. Butcher that he was asking me to distinguish, and I did distinguish between acts —sexual acts obviously accepted by the community as within its standards and on the other hand the depiction of those acts, and my testimony was that this act obviously was within community standards.

Q. You have just told us that a picture of that in a proper context is also within community standards, isn't that the fact?

A. I told you that it could be, yes.

Q. All right. And it is also a fact, is it not, that a photograph of fellatio—that is to say a [Vol. 15, 2699] having mouth-genital contact with the penis of a man—could be within community standards also in the correct context; right?

A. In, for example, a really scientific study of sexual activity, it presumably could, yes.

Q. Even if that were available to the general public as long as it was bona fide scientific study; right?

A. I think myself at the present time that depiction —yes, in a bona fide setting, right, but that depiction I am inclined to think is just a trifle over the line for

the general broad community standards at this time. It would not appear in Life magazine.

Q. Many things that wouldn't appear in Life magazine are still within community standards, isn't that the fact?

A. Well, yes, that is true.

Q. It is also the fact, is it not, Mr. Getlein, that a photograph of cunnilingus in a proper setting is within community standards?

A. In the setting we have been talking about, yes.

* * *

VOL. 17

* * *

[Vol. 17, 2975] MR. BUTCHER: The Government will rest, your Honor.

* * *

[Vol. 17, 3017] MR. KATZ: Under Rule 29, your Honor, of the Federal Rules, the defendants are entitled to move for entry of a judgment of acquittal at the close of the prosecution's case.

At this time, on behalf of my three clients—Shirley Wright, Earl Kemp and David Thomas—I would like to so move on the basis that the evidence heretofore submitted is insufficient to sustain a conviction of any of the offenses charged.

* * *

[Vol. 17, 3106] MR. FLEISHMAN: All right.

If the Court please, initially, just so the record is clear, we move under Rule 29 for a judgment of acquittal on the ground that there is no evidence on any of the essential elements of the offense with regard to both

cases, both with regard to Texas and with regard to the San Diego case.

* * *

VOL. 18

[Vol. 18, 3146] THE COURT: This being the time for the Court's decision on the motion under Rule 29 for judgment of acquittal, this Court determines that the proper test on a Rule 29 motion would be that set forth in [Vol. 18, 3147] *Curley vs. United States at 160 Fed. 2d 229*, wherein the court states through Judge Prettyman, and I quote:

> "If the evidence is such that a reasonable juryman must necessarily have such a doubt, the judge must require acquittal because no other result is permissible within the fixed bounds of jury consideration, but if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury and the decision is for the jurors to make.
>
> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether, upon the evidence, giving full pay to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion.
>
> [Vol. 18, 3148] "Or to state it another way, if there is no evidence upon which a reasonable mind

might fairly conclude guilt beyond a reasonable doubt, the motion must be granted.

"If he concludes that either of the two results — a reasonable doubt or no reasonable doubt — is fairly possible, he must let the jury decide the matter."

After a complete review of all of the evidence herein, both oral and documentary, together with the inferences that may be fairly drawn therefrom, and applying the aforementioned test thereto, this Court is of the opinion that the defendants' motions should be denied.

Turning now to defense counsel's argument that by definition a conspiracy requires an agreement to do an unlawful act, this is no doubt true.

The question arises, then, whether the degree of specific intent or scienter required to prove the conspiracy is greater than the specific intent or scienter required as to the substantive count.

This question is not without some logic. In fact, the California rule would seem to support that [Vol. 18, 3149] theory by requiring some degree of criminality in conspiracy cases. *Witkin in California Crimes, Volume 1 at Page 108.*

The Appellate decisions in the Federal Courts do not specifically answer this question in regard to conspiracy to violate obscenity laws, but the Supreme Court Case of the *United States vs. Ingram* in *360 U.S. 672 at 677 and 678*, dealt with the Federal Conspiracy Statute, 18 U.S. Code 371 and rejected the requirement of criminality.

"It is fundamental," the court said, "that a conviction for conspiracy under 18 U.S. Code 371 cannot be sustained unless there is proof of an agreement to commit an offense against the United States,"

citing *Pereira vs. U.S.*:

"There need not, of course," as the court goes on, "be proof that the conspirators were aware of the criminality of their objective, but an essential ingredient of proof was knowledge on the part of Smith and Law that Ingram and Jenkins were liable for Federal taxes by reason of the gambling operation. [Vol. 18, 3150] Without the knowledge, the intent cannot exist."

The court then cites *Direct Sales Company vs. U.S.*:

"Conspiracy to commit a particular substantive offense," the court goes on, "cannot exist without at least the degree of criminal intent necessary for the substantive offense itself."

The substantive offense which Smith and Law were accused of conspiring to commit was the willful evasion of Federal income tax, an offense which, even presuming knowledge of the tax law, obviously cannot be committed in the absence of knowledge or willfulness. Therefore, on the basis of the *Ingram* case, this Court rejects the defendants' arguments.

* * *

[Vol. 18, 3151] Finally, with respect to the matter of comparables, which we have talked about in recent times — it is the Court's opinion that the cases support the proposition that the Court is required to allow

defense counsel to proceed in order to show the community standards involved, either by comparables, by the introduction of comparables or by the introduction of expert witnesses with respect to the elements to be shown. The Court finds and rules that comparables will not be permitted for this reason: primarily, they tend to confuse the jury. They tend [Vol. 19, 3152] to set up matters that I feel would serve no probative value in comparison to the amount of confusion and deluge of material that could result therefrom.

The Court will permit, however, the defendants to proceed with the defense of their case based upon the testimony of expert witnesses, and the Court has been informed and would inquire of the defendants and through their counsel whether or not their number of experts now exceeds their original thought of eight. Do you expect to produce more than eight?

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[Vol. 18, 3186] W. CODY WILSON

* * *

DIRECT EXAMINATION BY MR. FLEISHMAN

* * *

VOL. 19

[Vol. 19, 3401] MR FLEISHMAN: The first matter has to do with the problem that I have in the case, your Honor, that I discussed with your Honor once before with regard to what the issues are, and I have particular reference, really, to what seems at this stage to still be a somewhat unsettled question, your Honor, whether or not the test is whether the dominant theme

of the book taken as a whole appeals to the prurient interest of the average person.

THE COURT: That is one of the tests.

MR. FLEISHMAN: It is our view, your Honor, that under the Bill of Particulars in this case, as I have explained to your Honor before, that that is all that is involved in this case, plus the fact — if your Honor even takes the proposed instruction of the Government with regard to some clearly defined sexually deviant group — now the Government has rested, your Honor, and I am talking now to proposed instruction No. 5, which is found on Page 10 of the Government's Proposed Instructions:

> "If you do not find that the dominant theme of the material appeals to the prurient interest in sex of the average person, you [Vol. 19, 3402] must then consider whether or not the materials involved are designed for a clearly defined deviant sexual group and whether the material taken as a whole appeals to the prurient interest in sex of the members of that group."

Now I know I have stated this before, your Honor, but there has to be some evidence that the material was designed for a clearly defined deviant sexual group, which has not been introduced here.

Besides the other criteria, it has to be distributed primarily to that sexually deviant group, a clearly defined sexually deviant group, before this *Mishkin* test would be applicable.

So there is a failure of proof on both sides of the factual condition, coming to any clearly defined sexual

group, plus the fact that there isn't even a clearly defined deviant sexual group that the Government has identified.

Now, plus the fact, which seems to me to be of substantial importance, that the Government has limited itself by its Bill of Particulars so that we have a situation, your Honor, whereby we were not prepared to defend against a charge other than a charge that the material appeals to the prurient interest of [Vol. 19, 3403] the average person, and we had made that perfectly clear in our papers, and the Government had made it perfectly clear in their papers that they were accepting that as being the issue.

For us now to be in the position of trying the case with some evidence then by the Government which we think is improperly in, and requiring defendants at this stage — I don't know how your Honor is going to instruct.

My own feeling is that we shouldn't have to get into it. I don't want to get into it. I think it is outside the case. I think that the test in this case under these circumstances is the prurient appeal, if any, to the average person.

It places an unfair and impossible burden upon us, your Honor. I think it denies us due process of law and the protections afforded by all of the cases which really sought to afford first an amendment protection to material that was being charged by having as much specificity as the law is able to give us in this area, which isn't very much, but this is absolutely, your Honor, as I indicated before, a return to *Hicklin*.

But the more important aspect of it is, there is no factual basis for it because the two preconditions before the *Mishkin* case would come in [Vol. 19, 3404] would be, as I say, that it was designed for a particular clearly defined sexually deviant group and was primarily distributed to that group, and as I say, neither of those apply.

In short, Your Honor, I would hope for some ruling by the Court. I suppose, or indication, with regard to the instruction that will be—I hope—the appeal to prurient interest of the average person, because I don't want to pursue it with my witness into areas that I think are absolutely outside of the scope of the issues which were denied to the Defendants I represent and to the other Defendants, due process of law and the rights secured by the First Amendment.

On the other hand, I feel uneasy at not doing it on the thought that perhaps after all it is all over Your Honor is going to instruct and I have defended perfectly on the issue as I saw it and that I am outflanked, which is a problem.

* * *

VOL. 20

[Vol. 20, 3421] THE COURT: Let the record show that the defendants are present with their counsel, that the jury is not present.

There were two matters that were to be taken up that were brought to the Court's attention at the last hearing. One was the matter of the *Mishkin* case, I believe. Mr. Fleishman wanted to know what he was going to have to defend against.

I have reread the *Mishkin* case and have reread the cases that it cites, and I find that I do not put the narrow construction on the *Mishkin* case [Vol. 20, 3422] that you do, Mr. Fleishman. I think that it is a little broader than you related to the Court. Therefore, I suggest that a properly drawn instruction will be given to the jury with respect to the matter and that you will be required to defend in that manner.

MR. FLEISMAN: Let me just state for the record, your Honor, that that is, in my opinion, outside of the scope of the issue; that it is beyond the Bill of Particulars furnished by the Government, the Bill furnished in response to ours where, as I pointed out to your Honor on at least two occasions and perhaps three — I don't have it before me — the Government stated that the issue was whether the material appealed to the prurient interest of the average person, period.

There was no suggestion of any kind or form that there was any group other than the average person involved. I did not prepare to defend against a *Mishkin* charge. I am not prepared now to defend against a *Mishkin* charge, and in my opinion the defendants are being denied due process of law and the right secured by the First Amendment in having thrust upon them in the course of the trial an entirely different charge than the one found in the Indictment and found in the Bill of Particulars.

I would like the record to show that I [Vol. 20, 3423] believe it is a denial of due process of law for us to be required at this late stage to defend against a charge not made, your Honor.

THE COURT: All right. I believe the prurient appeal is sufficient as set forth to cover both the average person, and if that not be the case, to those people included within the ambit of the *Mishkin* case.

* * *

[Vol. 20, 3515] MR. FLEISHMAN: May I state the stipulation so I understand it?

It is stipulated by and between the parties that each and all of the sexual depictions set forth in Table 11 are fairly and accurately portrayed in Exhibit 65, and that the same type of pictorial material was used [Vol. 20, 3516] in connection with the Commission work. Is that a correct statement?

MR. BUTCHER: Generally speaking.

MR. FLEISHMAN: Generally speaking, yes, I accept that stipulation.

THE COURT: Very well.

MR. FLEISHMAN: May we have the same stipulation with regard to Table 12?

MR. BUTCHER: We would stipulate that there are pictures in the book that depict the activities shown in Table 12 and that somebody, sometime, in the work of the President's Commission on Obscenity and Pornography, at least somebody, used at least one picture like that sometime.

We would agree to that. We have agreed all along that the entire subject matter here is, in Dr. Wilson's words, sexually explicit material, and to that extent everything here is sexually explicit material, so to the extent that the Commission dealt with that, there is no

question but what they dealt with all the types of pictures used.

MR. FLEISHMAN: I accept that stipulation.

THE COURT: I didn't think that matter was in contest, Mr. Fleishman. I don't think there is any point in pursuing it at all.

[Vol. 20, 3517] MR. FLEISHMAN: I accept the stipulation, your Honor, if that may close that area.

THE COURT: The stipulation is even broader than that, the whole theory of the stipulation. The Government doesn't contest that, that or any portion of it.

MR. FLEISHMAN: Well, in any event, one way or the other, we have to make it by evidence. I am prepared to accept this stipulation, your Honor, as I said.

* * *

[Vol. 20, 3518] BY MR. FLEISHMAN:

Q. Were there any studies at all or any work done by the Commission in connection with the pictures having to do with sexual activities between humans and animals?

MR. BUTCHER: We have stipulated to that, your Honor, that some Commission studies had used bestiality.

We have already entered into the stipulation.

MR. FLEISHMAN: That was not included in the stipulation so far, your Honor. I am prepared—I [Vol. 20, 3519] would offer a stipulation, your Honor, and if counsel would accept it we could make do with that.

That is, that in connection with the work of the Commission on Obscenity and Pornography, which is the text here, that there were pictures used of sexual

activity between humans and animals and that the use of these pictures took a variety of forms within the framework of research projects, within the framework of what the Commissioners themselves were observing and considering with regard to their overall work and what the Commissioners were viewing as part of their overall work.

If that is the stipulation that Mr. Butcher is willing to enter into, I would accept that.

MR. BUTCHER: No, we have already stipulated that every picture in this book was used by at least one of the researchers somewhere in the work of the Commission. We have never argued about that.

We are talking about the misstatement of the use of pictures by people who never even used pictures like that.

THE COURT: All right. If you will not accept the stipulation, then, Mr. Fleishman, you may ask your question and Mr. Butcher can object to it.

MR. FLEISHMAN: We hadn't stipulated that far, but [Vol. 20, 3520] I think I would be prepared to accept Mr. Butcher's stipulation. That is, that every picture in the Illustrated Report, found in the Illustrated Report, is similar to at least some of the material that was used by some of the researchers in some of the Commission work—of the Commission on Obscenity and Pornography.

If that is the stipulation, I accept it.

Is that the stipulation, Mr. Butcher?

MR. BUTCHER: We would stipulate to that if it would limit the parading in of witnesses in here to

say, "Yes, I used this kind and I used this kind and I used this kind."

MR. FLEISHMAN: It will have that effect and I do accept the stipulation, your Honor.

THE COURT: Very well.

* * *

[Vol. 20, 3544] Q. Dr. Wilson, we were talking about your reasons for believing that the book, Exhibit 65, did not patently offend national standards with regard to sex, nudity and excretion.

Would you please state your reasons for your belief —for your opinion, I should say.

A. Yes, it is based in part on scientific surveys and studies that indicate that people accept these kinds of materials in our society; secondly, that they have had experience with these kinds of materials in our society; thirdly, that people in responding to the kinds of illustrations or pictorial materials that are used as illustrations of this do not agree that they are universally highly offensive.

Another part of my opinion for the basis of my opinion is that these materials are available and are accepted by people in many places, most places in the United States.

MR. BUTCHER: We would move to strike, in the absence of a foundation, as to his basis for acceptability. The availability therefor, in and of itself, is immaterial.

THE COURT: The availability is immaterial. To that extent the objection is sustained.

[Vol. 20, 3545] BY MR. FLEISHMAN:

Q. Is there a reasonable degree of community acceptance of such material, Dr. Wilson?

A. Yes, I think so.

Q. And what is the basis for your opinion that there is a reasonable degree of community acceptance of such material?

A. Partly based on surveys of people; partly based on my own conversations with people; partly based on the reports of people that they have purchased materials of this sort.

Q. Dr. Wilson, do you have an opinion as to whether or not Exhibit 65, the Illustrated Presidential Report of the Commission on Obscenity and Pornography, does or does not go substantially beyond customary limits of candor in the description or representation of matters pertaining to sex, nudity or excretion in the nation as a whole?

A. Yes, I have an opinion.

Q. What is your opinion?

A. My opinion is that it does not.

Q. And would you tell the jury the reasons for that opinion, please.

A. Yes, the reason for my opinion is the basis of surveys done with national samples, representative [Vol. 20, 3546] samples of people in the United States and other smaller more circumscribed surveys that indicate that people accept this level of depiction of explicit sexual materials; further, that they do buy and use substantial numbers of them, materials of this sort that are used as illustrations in this book.

Q. Dr. Wilson, I hand you the brochure which has been marked Government's 2-A in evidence. Have you seen that brochure before?

A. Yes, sir, I have.

Q. Do you have an opinion as to whether or not that brochure considered as a whole does or does not appeal to the prurient interest of the average person?

A. Yes, I have.

Q. What is your opinion?

A. My opinion is that it does not appeal to the prurient interest.

Q. What is the basis of that opinion?

A. A series of scientific studies which have utilized pictures that are similar to those in this brochure and ask people to respond to them, to talk about them. Also, the fact that there have been a number of surveys of people's experience with materials of the sort that are illustrated here.

[Vol. 20, 3547] All of this evidence indicates that people's primary interest in these kinds of materials is a natural curiosity about sex, a natural interest in sex, a seeking of information about sex.

Q. Do you have an opinion as to whether or not Exhibit 2-A in evidence, the brochure, does or does not appeal to the prurient interest of any clearly defined sexually deviant group?

A. I have an opinion.

Q. What is your opinion in that regard?

A. My opinion is that it does not.

Q. And would you state to the jury your reasons for that opinion?

A. It is similar in nature on the basis of scientific experiments and surveys inquiring into people's reactions to these kinds of material, their reasons for looking at these materials, their reactions to them.

All of this indicates that the interest which people have in these materials and most people have had some experience with these materials, is essentially derived from a curiosity about them, from a natural, normal interest in sex and seeking of information about sex.

Q. Do you have an opinion as to whether or [Vol. 20, 3548] not the brochure, Exhibit 2-A in evidence, does or does not patently offend national standards, with regard to sex, nudity or excretion?

A. I have an opinion.

Q. And your opinion is what?

A. My opinion is that it does not patently offend.

Q. And your reasons, if they would be the same as before, tell us so; if they would be different, tell us.

A. They are essentially the same as before.

Q. Do you have an opinion as to whether or not the brochure does or does not go substantially beyond customary limits of candor in the nation as a whole in the depiction or representation of matters pertaining to sex, nudity or excretion.

A. I have an opinion.

Q. And your opinion is what?

A. That it does not.

Q. And will you state again the reasons or you can incorporate previous reasons if you would like to.

A. The reasons are the same ones which I have announced before.

Q. In your opinion does the brochure have any redeeming social importance?

[Vol. 20, 3549] A. Yes, I think that it does.

Q. And will you state your reasons to the jury, please.

A. It is an advertisement for a book that contains a great deal of information, of facts, relative to a very important issue in our society, and that it has importance in trying to communicate the existence of this book to people and ask them to buy it and to read it.

* * *

VOL. 21

CROSS-EXAMINATION

[Vol. 21, 3582]

BY MR. BUTCHER:

* * *

[Vol. 21, 3674] Q. Can prurient interest exist in a given work, or more precisely, can an appeal to the prurient interest exist on the face of a given pictorial depiction absent any acting out or causal relationship or excitation on [Vol. 21, 3675] the part of the viewer?

A. That is a rather complicated question with several different aspects of it. If we could take some of them—

Q. Take them any way you want, Doctor.

A. I think my belief—my expert opinion is, on the basis of a number of studies, that photograph, on the face of the photograph itself, cannot appeal to a prurient interest of an average person; that we have to know more about the interest that a person brings to viewing a photograph and the kind of subjective judgments that he makes and subjective responses that he makes to this.

I would say that to some extent that if prurient interest is defined in terms of lust, in terms of an excessive sexual interest that demands unrestrained grat-

ification, that then, you know, the kinds of responses that a person makes to a picture certainly has something to do with the kind of interest that it arouses, that it appeals to, that is involved in it.

Therefore, in response to your question, I think a picture on the face of it we cannot say anything about what interest it appeals to until we look at average people and find out what interest they bring to it, what kinds of subjective judgments they make, [Vol. 21, 3676] what kinds of responses, subjective and external that they make, yes.

Q. In other words, if nobody is looking, the picture can't have prurient appeal. Is that the sum and substance of what you are saying?

A. I said we can't make a judgment about the prurient interest that a picture appeals to unless we know what is brought to it; that is right.

* * *

[Vol. 21, 3683] Q. I will hand you what has been marked Government's 2-A, an advertising brochure.

A. Yes, sir.

Q. In discussing that item yesterday or last Friday, you offered an opinion, did you not, that there was no appeal to prurient interest in that advertisment brochure?

A. I think I did offer that opinion, yes, and I gave an abbreviated explanation of my reasons. Shall I elaborate on that again?

Q. Well, just generally, were they: 1) that there was a certain natural curiosity?

[Vol. 21, 3684] 2) a natural interest on the part of the viewer?

3) one might be seeking information about sex?

Is that a fair summation of what your testimony was?

A. Those kinds of things would enter into my opinion, yes.

Q. All three of these reasons you offer, Doctor, for an absence of prurient interest or an appeal thereto in the brochure — all center about the viewer's reactions, do they not, and the reasons he would want to look at this type of material?

A. It seems to me that the interest that is supposedly being appealed to resides in the viewer, and therefore I have to refer to the viewer and his response to the picture and not to the picture itself, yes.

Q. In other words, there has to be some sort of sympathetic reaction before there can be said to be any appeal?

A. I think there has to be this kind of an interest in existence among people before it can be appealed to, yes, and my testimony is that the kind of interest which people bring to — interest in dealing with explicit sexual materials — is not the prurient interest, as we [Vol. 21, 3685] talked about, that involves lust, unrestrained sexual desire, shame, morbidity. But it is a curious curiosity, a seeking of information, a rather natural kind of interest that is brought to it, yes, sir.

Q. You are married, are you not?

A. Yes, I am.

Q. If you and your wife were walking down the street and saw a very attractive young lady that turns your head as she went walking by, she can be said to have a certain degree of sexual appeal, at least for you; correct, being a male, red-blooded American male?

A. Wait a minute. Are we saying what she would say or what I would feel?

Q. Just a young lady, well-dressed, very attractive.

MR. FLEISHMAN: If the Court please, I will object to the question. He can ask hypothetical questions but I think this is not a proper question.

MR. BUTCHER: This is a simple analogy.

THE COURT: Overruled. This is preliminary.

THE WITNESS: Right, no, okay.

BY MR. BUTCHER:

Q. If you and your wife were walking down the street and approaching toward you —

[Vol. 21, 3686] MR. FLEISHMAN. May it just be Mr. Butcher and his wife instead?

MR. BUTCHER: All right, I will put myself into the area.

BY MR. BUTCHER:

Q. If myself and my wife were walking down the street and an attractive young lady came from the front and passed us and I turned my head to look at her, one might say she appealed to me, I found her appealing physically, perhaps, that the young lady may have had what we would generally call sexual appeal. Would that be a fair characterization of whatever appeal this young lady may have?

A. Well, I don't know about you. I can't testify about you.

Q. Assuming I did turn my head that way; my wife, however, would not have turned her head because she might not have found her at all appealing from a physical view standpoint. Now had my wife

been walking down the street alone and she didn't look at the young lady, could we fairly say that because she didn't appeal to my wife that she has no appeal at all? Would these characteristics vanish?

A. It seems to me just as you have been describing here that what we have to do in talking about the [Vol. 21, 3687] appeal of this stimulus of the attractive woman is to look at the response of the people.

Q. Right.

A. That they bring to it.

Q. Perhaps so.

A. Their attitudes, their judgments, their feelings, the kind of interest that they bring.

Q. Whether they are a man or woman.

A. It is possible, you know, that some person might turn and look because of an interest in clothes.

Q. Right.

A. Or because of beauty, or because of a sexual interest. There are any variety of kinds of interest that might be brought to bear on looking at anything in the world, and that, you know, you can't talk about the appeal until you talk about the interest that is brought there.

Q. In other words, you are saying there is none unless there is some manifestation of interest.

A. I do not see how we can talk about appeal to the prurient interest unless we can demonstrate that the people are bringing this kind of interest to bear on this picture. It is just inconceivable to me. You know, I cannot describe the kind of interest that any picture, any person, or any object in the environ-

ment [Vol. 21, 3688] appeals to unless I have some information about what kind of interest people bring to this object and what kinds of interest people have in the environment where this object occurs.

Q. In other words, then, Doctor, is it a fair summation of your testimony that you add here to the adage, beauty is in the eye of the beholder; or to plug it into the context in which we are dealing, obscenity is in the eye of the beholder; nothing more or less?

A. It seems to me that a judgment of obscenity occurs in the person who is looking at an object and making the judgment, yes.

Q. All right. Now you also spoke about the question of patent offensiveness and whether or not the advertising brochure here, Government's 2-A, and whether or not that went substantially beyond the contemporary community standards in dealing with matters sexual generally, and as I recall your testimony, it was that it was not patently offensive and it didn't go substantially beyond the community standards. Is that not correct?

A. That was my testimony, yes.

Q. Would you take a look at Government's Exhibit 2, please.

A. Yes.

[Vol. 21, 3689] Q. The envelope.

A. The envelope, yes, sir.

Q. Examine the name of the addressee, please.

A. Yes, sir.

Q. What is that name?

A. I am not sure I can pronounce it, but it is W and then a last name, R-e-i-n-i-g-e-r.

Q. Dr. Wilson, assuming W. Reiniger was Mrs. Willoughby Reiniger, age 75, Orange City, Iowa, and assuming Mrs. Reiniger had not solicited that advertising brochure or any other advertising brochure from Library Services, Inc., or any other sexually oriented material of any kind from anybody in her entire life. Would your testimony be the same relative to the non-offensiveness of that particular brochure?

A. Non-offensiveness to the general community? I think it would remain the same, yes.

As I have testified before, there are people in our society who are offended by various kinds of things, not just sexual materials and not just materials as explicit as this, and there are minorities of people who are offended, but to my mind as we have been discussing, this is not what we were talking about in terms of the standard but rather the community standard which involves groups of people and not one individual [Vol. 21, 3690] being offended.

Q. But it also includes Mrs. Willoughby—

A. I hope, Mrs. Willoughby, if she really exists, this was an assumption.

Q. She does.

A. This was a hypothetical you raised to me—is a part of the community, yes.

Q. Finally, you testified, I recall, that the advertising brochure had, in your view, redeeming social value for two reasons: 1) an advertisement offering for sale what you described as an important book and 2) it was trying to communicate to people the existence of this book, presumably for their purchase thereof.

Q. Is that your testimony?

A. I think my testimony was essentially that, yes.

Q. You have previously testified, of course, as to all three of the elements of obscenity regarding the book in question, Government's 65, and your testimony is that it doesn't meet any of the elements of obscenity; therefore, the book is not obscene in your opinion. Is that not correct?

A. I have testified essentially to this, that it does meet all three of these standards which is [Vol. 21, 3691] required by law, and then we discuss each of the standards generally, and I have given my opinion on those, yes.

Q. Assuming for the moment that the book were an obscene book, would that fact tend to alter your opinion regarding the redeeming social value of the advertisement itself if in fact we assume the book is obscene for a moment?

A. I am sorry, I lost a part of the question.

Q. All right. Let's assume that the book is obscene.

A. Yes.

Q. One element of which is an absence of redeeming social value; correct? If in fact we make this assumption?

A. If a book is judged—if a book is judged legally obscene.

Q. Right.

A. Then, you know, this would have to imply that it did not have redeeming social value, because in order to be classified as obscene a book must meet all three criteria.

Q. Right.

A. It must appeal to the prurient interest and it must be offensive and it must have no redeeming social value; all three; so if it is classified as [Vol. 21, 3692] obscene in a legal process —

Q. By definition.

A. (Continuing)—then by definition there has been a legal judgment that it does not have.

Q. But we haven't got that yet here; what we are doing is assuming that this book is obscene and more specifically we are making the assumption it has no social value, one of the three, anyway. Would the advertisement have social value notwithstanding the fact that the book is assumed, for now, to be obscene?

A. This is an awfully abstract question, because it is a concrete, you know — a concrete illustration to a concrete book that I know all about, and my opinion is that it is not obscene.

Q. Right. Well, let's assume for a moment your opinion is in error.

A. I would have to feel that if this is an advertisement for this book and my knowledge of what is in this book —

Q. We are now assuming the things I have asked you to assume.

Assuming you are wrong about your opinion insofar as the book is concerned, assuming the book is obscene, would then the advertisement have any redeeming social value?

[Vol. 21, 3693] A. It seems to me that to the extent which the advertisment presents some ideas of what the book that is trying to sell has in it, then the statements

that this brochure makes about the content of the book that it is trying to sell, that this has redeeming social value.

Q. What direct quotations are there in 2-A from Government's 65?

A. Direct quotations from what?

Q. What direct quotations are in Government's Exhibit 2-A that you also find in Government's Exhibit 65?

A. I didn't say that there were any direct —

Q. Would you take a look at the reference to the Katzman study on the other side of the advertising brochure. That is one, is it not?

A. Yes, but I said I didn't say there was. There is this. I am not sure it is a complete, direct quote. It looks to me like a part of it is cropped off over here.

Q. But to your knowledge is that the only place in the entire brochure that we see any kind of direct quotation from the book other than, I guess, the reproduction on the front?

A. The reproduction on the front — I would have to read the whole thing again and see.

> [Vol. 21, 3694] "A monumental work of research and investigation has now become a giant of a book. All the facts, all the statistics, presented in the best possible format . . . and . . . completely illustrated in black and white and full color. Every facet of the most controversial public report ever issued is covered in detail."

That is not quotations, but it seems to me to claim considerable social value.

> "This book is a MUST for research shelves of every library, public or private, seriously concerned

with full intellectual freedom and adult selection."

I am not sure that is a quote from the book but it does seem to offer considerable demand of social value.

> "Millions of dollars in public funds were expended to determine the PRECISE TRUTH about eroticism in the United States today, yet every possible attempt to suppress this information was made from the very highest levels."

Again I am not sure that is a quote from the book, but it seems to me to be presenting ideas that have social value.

> "Even the President dismissed the facts, out of [Vol. 21, 3695] hand."

I am not sure it is a quote from the book, but it is an accurate statement which does, you know, present social value arguments.

> "The attempt to suppress this volume is an inexcusable insult directed at every adult in this country. Each individual MUST be allowed to make his own decisions; the facts are inescapable. Many adults, MANY OF THEM, will do just that after reading this REPORT. In a truly free society, a book like this wouldn't even be necessary."

It seems to me that there is argument in this brochure about a very important social issue in our society, and that it is making a pitch that what it is advertising is of considerable social value, you know; that is the way I read it.

Q. Is that argument the dominant theme of that brochure, in your opinion?

A. Is it the dominant theme? Sexual materials and the concern about them in the Report, yes. I am not sure exactly what you mean by that question, but it appears so.

Q. So it is your testimony that regardless of whether or not the book involved is obscene, the advertisement does have social value?

[Vol. 21, 3696] A. It would seem to me, as I have testified before, that the brochure does not appeal to the prurient interest, is not contrary to community standards of offensiveness, of candor, and that the brochure as a whole does appear to me to appeal to ideas that are of considerable social value in our pluralistic society where people are arguing about social issues and about this one in particular.

The thing that makes me think that this is an important social issue is the amount of discussion that is given it in the press and in popular kinds of magazines and so on.

Q. Dr. Wilson, that is somewhat outside the scope of the inquiry.

A. Oh, all right.

Q. Looking at the other side of the coin, then, your opinion is that the ad has social value regardless of the attributes of the book. Now let's assume for the moment that you are correct in your opinion of the book and it does also have social value. That would, I assume, buttress your opinion in terms of social value for the advertisement, is that correct?

A. It would seem to me that as it advertises a book that has social value that it would—that this is also helpful—excuse me—in establishing its [Vol.

21, 3697] social value and to the extent that the book does present the kind of ideas that the brochure claims that it does, it would seem to me that the brochure is valuable.

Q. Let me ask you this. Would it be possible in your opinion to formulate an advertising brochure for sale of the Bible from which you just chose pictures that in the opinion of the draftsman if the advertising brochure effectively illustrated the activities, say, in the Song of Solomon, completely filled the brochure with pictures and in fine print at the bottom said, "This is an advertisement for the Bible", which we all must concede has some social value.

Would it be possible to formulate as an advertising brochure what you would consider to be obscene for a book that we would all assume is not obscene? Would that be possible at all?

A. Oh, I think it might be possible. I haven't engaged in this exercise, but it is conceivable.

Q. In other words, assuming the book does have social value, it would be possible to formulate an advertisement that would be obscene regardless of the attributes of the book?

A. It is possible, I think, yes.

Q. What would you do to that advertisement to [Vol. 21, 3698] transform it to an obscene advertisement?

MR. FLEISHMAN: Which one? The hypothetical one, Mr. Butcher?

BY MR. BUTCHER:

Q. The one we now have in front of us, Government's 2-A.

A. This one?

Q. Yes.

A. I don't know.

Q. In your opinion, Doctor, can anything be obscene?

A. I think it is possible that there is a category of material that is defined by the Supreme Court Judges as being—if things met these kind of criteria, it is a category that is not protected by the First Amendment and is obscene.

Q. Give me an example. Describe what you think would be an example of something that would meet all three elements.

A. I think to have all of these things coalescing restricts the content of this category quite considerably. It would seem to me that the Supreme Court did this knowingly.

Q. Right.

A. Trying to restrict the categories to a very [Vol. 21, 3699] small set of instances.

Q. My question is—

A. I don't know. If you would give a me a series of examples that you think might be, I would try to make a judgment as to whether these are obscene or not, in terms of these criteria.

Q. You are the expert and you would, I assume, have more—

A. (Interposing) I am an expert in whether a concrete material appeals to the prurient interest, is contrary to community standards, is offensive, and has no redeeming social value, and I do make these kinds of judgments when I am presented with a piece of

material. But I don't go out of my way to try to create these examples. I don't know. Maybe give me a while.

* * *

[Vol. 21, 3700] Q. And you can't recall having ever seen anything in the past two years in which all three elements would coalesce—that is, come together and all be simultaneously present?

* * *

[Vol. 21, 3701] A. I do not at this time remember a specific piece of material that might fit these, but I am not saying that I did not see such and would not make the judgment if I had material in front of me to judge.

* * *

[Vol. 21, 3721] REDIRECT EXAMINATION

BY MR. FLEISHMAN:

* * *

[Vol. 21, 3740] Q. Dr. Wilson, assuming that for a work to be obscene it must first have all been utterly without redeeming social value and it must appeal to prurient interest and it must patently offend community standards in the nation as a whole and go substantially beyond customary limits of candor; making that assumption, Doctor, do you have an opinion as to whether or not Exhibit 65, the Illustrated Report, is or is not obscene?

A. It is my own —

MR. BUTCHER: He has answered each one of those, one at a time, previous to this.

THE COURT: He is entitled to ask it.

THE WITNESS: It is my opinion that taking these three or four requirements to be legally obscene, that this Government's Exhibit 65 is not obscene.

BY MR. FLEISHMAN:

Q. And assuming the same set of hypotheticals with regard to what obscenity is and with regard to the brochure, do you have an opinion as to whether or not the brochure is or is not obscene?

A. It is my opinion that the brochure is not obscene.

VOL. 22

[Vol. 22, 3753] DWIGHT V. SWAIN,

* * *

DIRECT EXAMINATION

BY MR. FLEISHMAN:

* * *

[Vol. 22, 3857] Q. Professor Swain, I have handed you Government's Exhibit 2-A, being the brochure advertising the book in question. Do you have an opinion as to whether or not that brochure does or does not have any redeeming social importance?

A. I would say it has redeeming social importance.

Q. And will you tell the jury the reason for your answer, please?

A. This is an advertising brochure. The basic function of advertising is to inform. Therefore, it fulfills its function as advertising. It informs as to the content of a particular work and explains—gives a picture of what is going to be included in that work if a person orders it, reveals the very fact, the publication of the work, and in general provides infor-

mation which the person would not have if he had not examined the brochure.

MR. FLEISHMAN: I have no further questions, your Honor.

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VOL 23

[Vol. 23, 3922] VIRGINIA CARLSEN,

* * *

[Vol. 23, 3941] JACK HABERSTROH,

* * *

[Vol. 23, 3994] Q. Now, you have the advertisement in front of you? Have you seen the advertisement 2-A before?

A. Yes, I have, sir.

Q. Incidentally, Professor, in the courses you teach in your study in the field of journalism and advertising have you made any studies of the subject of whether or not sex is used in advertising?

A. Generally we discuss this in at least one or two class periods in my advertising class, and it seems to come up through the semester at one time or another and we have discussed it, as I recall, to a certain extent in Journalism 121 class, the Current Problems Course.

* * *

[Vol. 23, 4007] Q. In your opinion, Professor Haberstroh, does the advertisement referred to in 2-A go beyond or substantially beyond the areas in which you have found the purpose of advertising and as defined herein?

A. Certainly not.

* * *

[Vol. 23, 4019] CROSS-EXAMINATION

BY MR. BUTCHER:

* * *

[Vol. 23, 4038] REDIRECT EXAMINATION

BY MR. KATZ:

* * *

Q. You told us in answer to Mr. Butcher's question that the Exhibit 2-A has serious comment and you started to tell us about the statement, "Thanks a lot, Mr. President."

Is there anything else you saw in the advertisement [Vol. 23, 4039] that Mr. Butcher asked you about that indicated to you that the advertisement was a serious effort besides those words?

A. Well, I was going to go on and comment about the editorial statement on this part of the brochure, and I was just going to say one or two things about it.

First of all, it seems to me that this brochure is attempting to sell the book to the people that would be getting the brochure in a very serious way despite Mr. Butcher's comment about the pictures; and the comment, "Thanks a lot, Mr. President," seems to me refers to the fact that President Nixon disavowed the work of this Commission that had been working for two years gathering data on this subject, which in my view, at least, has enormous social significance, and I think that is the thrust of this, "Thanks a lot, Mr. President" headline, which is really a very serious comment and it is a commentary, really, on our administration.

Q. Was that one of the functions of advertising?

A. To do what? To make a comment?

Q. Yes, of social significance.

A. Well, I think if the advertisement can do that, [Vol. 23, 4040] in addition to selling a product, that is great — if it can do that.

Maybe this one does that.

* * *

RECROSS-EXAMINATION

BY MR. BUTCHER:

Q. One of the functions of an advertisement, as I recall, you state it is not to offer social commentary or interpretations or views but if it can do that, that is a good thing?

A. May I give you an example?

Q. Please do. Go right ahead.

A. It seems to me we have a lot of gaps in our society. One gap that I have noticed is the gap between policemen and students; okay?

Q. Well —

A. So I think that, you know, we ought to do what we can to close this gap. So I had my students design ads which would run in the Police Chief Magazine which would attempt to influence the police that indeed [Vol. 23, 4041] the students were not such bad guys; okay?

Now it seems to me in that regard—and these ads did run as full-page ads in this magazine called the Police Chief Magazine—we turned the assignment around later, but the point is, these advertisements in addition to selling a concept, indeed, that we should try to close up these kinds of gaps, did make a social comment.

Q. In other words, they were selling the concept; they were making a comment and in effect selling a concept, not a product?

A. They were selling a concept, true.

Q. What about—

A. (Interposing) The concept being that we ought to get closer together, that we ought to try to understand each other and communicate with each other.

Q. I understand.

Well, the offering, then, of social value judgments and editorial viewpoints—do you find that then to be a very integral part of the journalistic process in general, do you?

A. I think that those kinds of judgments are there, reflected in one's attitude on every subject, much less journalism—if I am answering [Vol. 23, 4042] your question.

* * *

[Vol. 23, 4043] RECROSS-EXAMINATION

BY MR. FLEISHMAN:

Q. Doctor, in answer to Mr. Butcher's question you stated that the advertisement, Exhibit 2-A, in addition to attempting to sell the book, was selling [Vol. 23, 4044] a concept. Do you recall that?

A. Yes, sir.

Q. What concept was being projected in the advertisement?

A. I think it probably is improper to take the advertisement isolated from the product it is selling and if I may, I think that we should think in terms of this particular advertisement selling this particular pub-

lication which has a message that seems to me we all ought to be listening to, no matter how we feel about it.

If we object to the present obscenity and pornography laws, or if we are in favor of the present obscenity and pornography laws, is immaterial. It seems to me that we should be listening to the message contained in this book, and that is really what I meant by advocating a position.

I am not sure that mail piece by itself advocates a position.

* * *

VOL. 25

[Vol. 25, 4187] OTTO N. LARSEN,

* * *

BY MR. FLEISHMAN:

* * *

[Vol. 25, 4242] Q. Now, Doctor, there is before you an envelope, a brochure. Will you please open the envelope and take a look at the brochure and tell us whether you have seen that brochure before.

A. Oh, yes, I have just seen it.

Q. When you say you have just seen it—

A. I saw it yesterday for the first time.

Q. And who showed it to you?

A. You did.

Q. Had you seen the book before then—of course.

A. Oh, yes, I purchased the book at a discount.

Q. Directing your attention now to the brochure, Exhibit 2-A, I believe is its number—do you have an opinion as to whether or not that [Vol. 25, 4243]

brochure does or does not have any redeeming social importance?

A. Yes, I have an opinion.

Q. And what is that opinion?

A. I believe it does have redeeming social importance.

Q. Why?

A. Well, essentially for the same reasons that I discussed in the book, but here I think is a little different context, in addition to that.

This is obviously an advertising brochure. Now in order to judge the importance of this one has to ask: What is the function of advertising in our society, its recognized function?

The function of advertising is to call our attention to objects that are available and to attempt to induce you to seek these objects, to purchase them.

This vehicle does precisely that. It tells us what this is all about. It represents material that is in the Illustrated version. It makes an argument for making the purchase. It tells us what it costs and how to do it and it protects us in the event by certifying a certain kind of signature?

[Vol. 25, 4244] There are certain kinds of claims that are made or protections that are made for the purchaser.

Q. What do you have reference to there? The jury doesn't have the brochure before it.

MR. BUTCHER: That is immaterial. It is in evidence.

THE COURT: Overruled.

BY MR. FLEISHMAN:

Q. Will you read what you had reference to just now, Doctor?

A. Well, when you order this you certify that you are over 21 years of age and that you desire the book solely for private contemplation in the privacy of my home and you sign your signature as well as print your name, and it seems to me that this is sort of making a kind of a commitment with yourself as to what this is all about.

I suppose—I would like to add one other thing about the context of advertising.

I think with respect to advertising in America we all recognize that advertising is sort of a shorthand of forthcoming events. We also recognize that advertisers take great liberty, I think, with shorthand. Sometimes they make excessive claims or [Vol. 25, 4245] strong claims.

My judgment is that this brochure, brief as it is, makes a strong claim in its statement about why the book should be purchased.

Q. What is the strong claim made?

A. Well, it tends to put what I think is a complex social issue, as I see it, into a kind of political framework and in so doing it reflects, I think accurately that original volume, the Government volume, was received negatively by political leaders and then it makes a statement that I personally would not have made as an advertising person, because I would hope to have sold some of this to Republicans as well as the Democrats.

I think this is a nonpartisan issue.

It says, "Even the President dismissed the facts out of hand," and that this is an inexcusable insult directed at every adult in this country.

I believe the President has a right to react in any fashion that he wants and I wouldn't try to make political capital — I think that is a strong statement and the issue is a social, family, community, moral issue. It is not a political issue, I believe, and therefore I think that is a very strong statement.

[Vol. 25, 4246] But I can see as an appeal of advertising it might attract someone's attention to find out what the President was objecting to.

Q. Do you have an opinion as to whether or not the brochure does or does not appeal to the prurient interest of the average person?

A. I have an opinion.

Q. What is that opinion?

A. I think it does not. Essentially for the reasons that I specified with the book. It is an accurate representation of what the social issue is. Whether one finds this issue distasteful or whatever else, there is some material with which to do it. It reflects it in a sampling sense, and I think that people as far as the full range of reactions to these materials that I have witnessed in these studies — a surprising range of reactions from approval to disapproval to disgust to everything else — is attached to these kinds of materials, not a unified reaction.

America is not polarized on the subject of explicit sexual material. It is granulated. There are all kinds of views even within one person who is willing to at-

tribute a full range of views to these. All kinds of interests — that is a fact and we have to deal with that fact.

[Vol. 25, 4247] Q. Do you have an opinion as to whether or not the brochure does or does not patently offend national standards with regard to the depiction or representation of matters pertaining to sex, nudity—

A. (Interposing) I have an opinion.

Q. What is that opinion?

A. My opinion is that it would not.

Q. Why?

A. Essentially also for the same reason that the book would, and with the additional factor that I think the tolerance level for what goes on in advertising is probably greater than in any other sector of American life given the vast experience we have had with this.

For instance, we have done research on advertising showing when advertising was first introduced in radio, compared to in the early period, toothpaste was considered offensive.

Today we have gone way beyond toothpaste on television and so forth and indeed most American people approve of ads on television. A minority is very vociferously opposed to it.

We have a great tolerance to advertising. We even trust used car dealers.

* * *

[Vol. 25, 4275] CROSS-EXAMINATION BY MR. BUTCHER:

* * *

[Vol. 25, 4301] Q. Dr. Larsen, you have before you Government's Exhibit 2, enclosed in which is Government's Exhibit 2-A, the advertising brochure.

A. Yes.

Q. Would you examine the brochure.

You drew specific reference on direct examination to the statement thereon. Would you read about the "I certify"?

A. "I certify by my signature below that I am 21 years of age or over and desire the book solely for my private contemplation in the privacy of my home."

Q. Your testimony, as I recall, was that this certification protects us. By that, the person signing it is making a kind of commitment to himself.

Could you explain what you meant by that, please?

A. I will try. I don't think that the writing of a signature or the printing of your name is [Vol. 25, 4302] an act that most people would take lightly. But I would concede that there are no sanctions about any violation of this attached to that thing, but I do think—this is the kind of device, and it is more than just a printing of your name, it is a matter of signature, and my guess is, and I really have nothing but just an estimate of this—that people don't attach their signature to things without some meaning. In that sense they are at least saying to themselves—and they may only be kidding themselves in this thing under some circumstances—that this is how I am going to use this.

Until it is demonstrated as done otherwise, I would be willing to accept that as I would accept your signature on a check or a statement until proven that it is not the case.

Q. What if you didn't see me sign the signature? Would that alter your opinion any?

A. I would be skeptical, but we accept signatures on petitions and other things. We don't watch each signature. I would be skeptical, to be sure, and I am not putting great weight on this. I am simply saying it is a unique device.

As far as I understand, it is a device that the people who are involved with these kinds of [Vol. 25, 4303] things are attempting to specify exclusions of the kind of persons that they don't want to get involved with this. How effective it is, frankly, I really don't know.

Q. Do you have any idea how old the youngsters are today when they learn to write in school?

MR. FLEISHMAN: Objection on the ground it is incompetent, irrelevant and immaterial.

THE COURT: Overruled.

MR. KATZ: Argumentative.

BY MR. BUTCHER:

Q. Do you have any idea how old youngsters are when they learn to write—I mean script, not print?

A. Oh, yes. I have four children. I think I could guess.

Q. I didn't learn until the third grade. Perhaps they are doing it sooner now. Perhaps you can enlighten us.

A. I think around the third grade. They do letters up to that point.

Q. By fifth or sixth grade, perhaps, they are rather competent, are they not? Do you have any in the sixth grade?

A. I have had four of them there. One is [Vol. 25, 4304] in the seventh, the youngest.

Q. They can write with some degree of competence, can they not?

A. Yes.

Q. How old is a person when they are in the sixth or seventh grade?

MR. FLEISHMAN: I will object. It is outside the scope of the inquiry. The question is, does it appeal to the prurient interest of the average person, an adult. There was no one other than an adult involved in this case and it is immaterial.

THE COURT: No, I don't think so, Mr. Fleishman. Overruled.

BY MR. BUTCHER:

Q. How old then?

A. Seventh grade. My seventh grader is 12 years old.

Q. A sixth grader might then be 11 years old?

A. That is correct.

Q. Maybe even 10 if he was born at the right time of the year?

A. Yes. Are you saying they could forge their signature or indicate—forge the age thing?

Q. By signing their signature I don't know that forgery would be the appropriate term. I am asking [Vol. 25, 4305] you, isn't it possible that someone could write their name on there and not be known to be only 10 or 11 years old?

MR. FLEISHMAN: It is incompetent, irrelevant and immaterial, contrary to the facts herein. Every

one of the addressees came before the court. There wasn't a 10 or 12-year-old came in.

MR. BUTCHER: If the Court please, the witness stated that certification protects us. It has to do with making of kind of commitment with yourself, and I was just trying to establish that most 10 or 11-year-olds—

THE COURT: Overruled. It is cross-examination.

BY MR. BUTCHER:

Q. Doctor, do you think most 10 or 11-year-olds have the same kind of commitment with himself about the gravity of signing a signature that, say, you or I would?

A. I find that—I really don't know the answer to that question, I guess. I find that with the youngsters that I have worked with—and I do a lot of work in schools—I am constantly refreshed by their candidness, honesty, and their positive attributes much more than I am the troublesome things.

I may be an optimist in this regard. [Vol. 25, 4306] There is a lot of basic honesty there, and don't underestimate it.

Q. Now then, let's get to the issue of what you spoke of earlier on direct examination, mass media, the salient features of which I think you stated were, 1) the intent of the communicator and 2) the impact of the message.

Is that basically your testimony regarding the mass media?

A. That at least anchors the two ends, the sender and the receiver. In between we have the channel and

after reception we have the impact as it relates to other people or to self, yes.

Q. And advertising, of course, falls within the generic classification of one of the mass media?

A. It is transmitted via the mass media. It is certainly a basic body of content in American mass communication.

Q. And you testified, did you not, Exhibit 2-A is an advertising piece?

A. An advertising what?

Q. An advertising brochure?

A. Yes.

Q. Flier, whatever you want to call it?

A. Yes. Quite similar to the one used in [Vol. 25, 4307] textbooks, as a matter of fact, in format.

Q. Would you explain that, please. I am in the dark on that.

A. Yes, I will be glad to.

By coincidence, as I said, I hadn't seen this until yesterday, but I can bring you from any files including my own book, the kinds of brochures that Harper and Rowe or McGraw Hill put out on textbooks. It often includes a montage of photographs that are used in the text and then a statement and then some kind of message, "This is what you need and here is where you get it."

It is usually two pages like this and it is in color and it is attempted to attract the attention of the viewer —obviously not the same content, but essentially the same kind of format.

There must be a profession of advertising who use each other's guidelines.

Q. They are attempting to attract attention to the publication by dwelling upon what the communicator presumably thinks is going to be of the greatest interest. Is that not correct?

A. I would assume so, or whatever he thinks will attract the greatest interest.

Q. And in this instance it is quite clear, is it not, that the communicator here was firmly [Vol. 25, 4308] convinced that explicit sexual material would attract the very most attention?

A. I would assume so and that is precisely what this volume is all about, explicit sex material.

Q. Do you have an idea—

A. In words and pictures.

Q. Is there any strong emphasis, or as a matter of fact, is there any emphasis at all in Government's Exhibit 2-A laid to the issue of the textual material in this Government's 65, or is all the emphasis laid on the photographic depictions included therein?

A. Well, certainly in terms—if you want to measure in terms of space, obviously the photographs take up one-half of the whole document. Right?

But if you will read the words—

Q. I have.

A. —you will see that the emphasis also in terms of the monumental work of research and investigation, and the other issue that underlies this whole thing of the right of someone to have access to this and make up their own mind, which may be in fact the critical basic issue at stake—some people think it is—so I think there is some reference here to it but is it very clear, yes, in terms of space.

[Vol. 25, 4309] But again, what is the impact? What do people see when they see this? Some people would be probably more upset about the statement of the President than they would about the pictures.

Q. I was going to ask you — you mentioned six words: monumental work of research and investigation. Is that your opinion as to what the impact of the advertising brochure is? Is it more fair to say that the overwhelming impact of the advertising brochure is one of graphic sexually oriented materials of the most explicit nature?

A. To judge that I would refer again to the tremendous variability of that impact.

We had measures of impact that people give when they respond to the varieties of pictures of this sort, and since you put the question in terms of impact, we have to turn to the audience, and the arbiter of the question is the audience response and the answer there is, variability.

I find many of these things disturbing, et cetera. Some people do and some people don't. It is highly variable by type.

The data are available in the book for you to see. It is important to understand, unpleasant as it may be. It is a social fact.

[Vol. 25, 4310] Q. Would you describe the photographs included on the inner portion of Government's 2-A as explicitly erotic material?

A. Explicitly erotic material? Yes, I would. I certainly would. Explicit sexual material.

In our reports we used the phrase "erotic material" and "explicit sexual material" as synonymous. I would call it that.

Q. "Explicit erotic material"?

A. Well, that is a little bit redundant. We use either erotic or explicit sexual material.

Q. I see. So if it is erotic it is by definition explicit sexual material?

A. Yes, I would think so, the manner in which we used it, at least.

Q. Would you go to Page 238, Doctor, in the middle column, about halfway down, disregarding the middle column now.

A. All right.

Q. Disregarding the three lines, that paragraph at the top. Then there is another full paragraph and finally a full paragraph beginning with: "A review of that business . . ."

A. Yes.

Q. Then down about eight or ten lines there is a [Vol. 25, 4311] sentence beginning with "Moreover . . ."?

A. Yes.

Q. It states:

> "Moreover, most mailers now place a warning on their envelopes, and the most explicitly erotic material is sold in special bookstores."

A. I have engaged in the very redundancy that I call your attention to there, yes, that is correct.

Q. In any event, were you saying that explicitly erotic material is sold only in the special bookstores or

were you also including mailing envelopes, that explicit erotic materials are also sold through mailing envelopes?

A. Just a moment, let me read this.

If I understand your question, I would think both, that explicit, erotic sexual materials are available in bookstores and available by mailings. At least that is what we found in our Commission studies and that is the material that we saw. We saw both channels, what went into both channels. They are very explicit, as explicit as this material I am showing you here now.

Q. And you wrote here, did you not, that:

[Vol. 25, 4312] "Moreover, most mailers now place a warning on their envelopes . . ."

A. Yes.

Q. Would you examine Government's 2-A and read the warning for me there.

A. Unless it is covered by Government's—

Q. I can assure you it is not.

A. I assume not. I do not see any such warning on this envelope.

Q. Would you examine the interior of Government's 2 and see if you find, for instance, an inner envelope carrying that message.

A. I have the envelope. I see no such message.

Q. That in fact is a pre-addressed return envelope, is it not?

A. Yes, to Library Services, Inc.

Q. So in fact the person who opened that envelope had no idea what was inside, did he, or she, in this case?

A. . . . had no idea until it was opened, correct, although I am beginning to get a sensitivity to these things. I wouldn't be able to know until I opened it.

Q. You drew reference under direct [Vol. 25, 4313] examination by Mr. Fleishman—you drew reference to Color Plate XX, I believe. Go to that Color Plate.

A. What page does it follow, please?

Q. It is in that section where XVII was also, the one we talked about a moment ago. The next section of color plates.

A. Yes.

MR. FLEISHMAN: If the Court please, I will object to the question. I was the one who drew attention to it, not the witness. Misstatement of the evidence.

BY MR. BUTCHER:

Q. All right. Mr. Fleishman drew your attention to Color Plate XX.

A. Page 288?

Q. Yes, immediately following Page 288.

A. Yes. Wait a minute. Color Plate XX, the "Animal 2."

Q. Yes.

A. Okay.

Q. Do you recall testifying about that or do you recall testifying relative to Color Plate XX?

A. Yes.

Q. And your testimony in substance, was it not, was that materials similar to this you had brought [Vol. 25, 4314] before the Commission?

A. Yes.

Q. And you testified, did you not, that you found the material in Copenhagen?

A. Yes.

Q. And did you ever buy any of it here in the United States, material of this type depicting bestiality?

A. I have seen it for sale. I have not purchased it personally.

Q. Can you tell us where you have seen it for sale and when?

A. Yes. As recently as—well, within a few months in Washington, D.C., about six blocks from the White House.

Q. Do you know the name of the bookstore, by the way?

A. No, I don't

In Honolulu in April. I don't know the names of the stores, in several stores.

Q. And it was right in front of the counter, is that correct?

A. Not on the counter. On a rack.

Q. On a rack?

A. Yes, face out, and in Seattle, Washington.

[Vol. 25, 4315] Q. This, too, was an adult bookstore?

A. Yes.

Q. Did you ever see any of this material in a drugstore, say?

A. Never in the United States. In fact, the adult bookstore operators I find are very strict on age credentials and so on and information concerning it is rarely available.

Q. Did you ever see this type material in newsstands in a hotel, say?

A. In the United States?

Q. Yes.

A. No, I have not.

Q. How about in the book department of a department store?

A. No, I have not.

Q. You are at the University of Washington, are you?

A. Yes.

Q. How about the University of Washington Bookstore or any collegiate bookstore in the United States—

A. Let's see. Not these bookstores, but to the extent that this book may be available in such [Vol. 25, 4316] places.

Q. May be. I am talking about now, "Animal 2 Bizarre."

A. No, I have not. I have not seen it. The only place I have seen it is in adult bookstores. That is the only place I have seen it in the United States.

Q. And because it appears in such places as adult bookstores it is your opinion, is it not, that the national community standards is not substantially exceeded by the depiction of this material?

MR. FLEISHMAN: Objection to the question as a misstatement of the evidence. The witness did not rely on that. He relied upon the national survey and the research project he is referring to.

THE COURT: Overruled. That was part of his opinion but his opinion is his opinion irrespective of what it is based on.

THE WITNESS: I would like to state it myself if you don't mind.

BY MR. BUTCHER:

Q. Go right ahead.

A. Would you phrase the question again?

Q. Based, then, on the fact, among others, I suppose—let me reframe it.

[Vol. 25, 4317] Bearing in mind that you have never seen material such as that depicted on Color Plate XX in drugstores, department store book departments or collegiate bookstores or in hotel newsstands, is it still your testimony that materials similar to Government's 2-A is not substantially in excess of the national contemporary community standards in dealing with matters pertaining to sex and nudity?

A. I would like to answer that yes and I would like to, if I may, explain.

Q. You certainly may.

A. Okay. I said it was my opinion, and my opinion is based on the responses that were given to material in the national survey and of the studies.

I cannot testify that this exact material was so represented because, as a matter of fact, the reason I became concerned about this, I find this, as you probably do, very strong material and personally don't like it, let me add. But I do know that it is part of the product that is available and it doesn't minimize its reality that it is available in adult bookstores because things that are purchased there also circulate. It is available. These things do sell and it was also, I think, part of the evolution of explicitness.

[Vol. 25, 4318] When I came across it in the form that I did — it was the practice of the Commission to bring new material to the attention of the Commission. We had seen some like this. We had not seen it in this particular package, and that is what I did.

Part of the reality, the evolution of this material; it exists whether I like it or not — and I don't.

There is curiosity about it, all kinds of curiosity about these things, and there is evidence from that in the history of the evolution of so-called pornographic literature in written form as well. It is an ancient theme now made in color photographs. Is there a tolerance for it? There is a curiosity about it. There are purchases of it.

I am not trying to state that everybody is mad about it or anything of that sort. I am merely saying there is a tolerance for it, and along the same grounds of reasoning that we use from the national survey as to what people will tolerate. I would not expect 30% of the adults to tolerate sadomasochistic literature—the right to access to that, but they did, and without harm.

* * *

VOL. 26

[Vol. 26, 4359] MR. FLEISHMAN: Thank you, your Honor.

If your Honor, please, subject to some rulings on evidence that are before the Court and other matters, the defendants rest. All of the defendants rest.

THE COURT: All right.

[Vol. 26, 4360] Mr. Butcher, do you have any rebuttal at this time?

MR. BUTCHER: May I have a few moments, your Honor?

THE COURT: All right.

MR. BUTCHER: Do I understand that all the defendants rest at this time?

MR. FLEISHMAN: You understand correctly, yes, all the defendants.

THE COURT: Is that correct, Mr. Katz?

MR. KATZ: That is correct, your Honor, except for evidentiary matters.

THE COURT: You mean except for the hearing on the physical evidence?

MR. KATZ: Yes.

THE COURT: For the admission of physical evidence.

MR. KATZ: For the admission of physical evidence. We have no testimony to put on at this time.

MR. BUTCHER: The Government would have no rebuttal, your Honor.

* * *

[Vol. 26, 4364] THE COURT: All right. Let the record show that all defendants are present with their respective counsel, that the jury is not present. This is the time with respect to any argument had on the introduction of evidentiary matters, physical evidentiary matters.

You may proceed, Mr. Fleishman.

MR. FLEISHMAN: If the Court please, I would like to start, if I may, with Exhibit A, which was marked when we were all strangers one to the other. That is the *Pinkus* Film, as the Court will recall. That

was a motion picture film found to be not obscene by the Ninth Circuit and then affirmed by an equally divided United States Supreme Court.

We would like to have that film [Vol. 26, 4365] introduced in evidence for the purpose of aiding the jury in knowing the kind of material finally adjudicated as being protected by the First Amendment.

We believe that film is comparable in the sense and only in the sense, your Honor, that it deals explicitly with an aspect of frank sexuality.

I believe that a jury might find from seeing the film that it is sexually more arousing than the material before the Court, and the jury would be able to possibly —probably, in our opinion—use it for purposes of making comparisons with regard to material which has finally been adjudicated as being not obscene.

Now within that framework, your Honor—if this is not out of order—I would like to have marked as Exhibits A-1 and A-2, two magazines that were found to be not obscene by the United States Supreme Court while this case was going on. It is the case marked here. It is the case in South Carolina where the United States Supreme Court found both of those publications to be not obscene. By citing *Redrop*, and just so we don't have any quarrel in terms [Vol. 26, 4366] of language used, the Supreme Court reversed *Redrop v. New York*, which I believe everybody agrees—or almost everybody agrees—that the material could not be found to be obscene under any constitutional test.

In any event, your Honor, I would like to have those marked as A-1 and A-2 with the representation

that those are true and correct copies of the publications involved in the case which is set forth on the margin of the front page thereof.

THE COURT: Is this both in the same case?

MR. FLEISHMAN: Yes, your Honor. The name of the case is on the margin—Burgin.

THE COURT: They may be marked. I am not going to permit them into evidence, Mr. Fleishman, but they may be marked. Nor am I going to permit the film in evidence. It may, however, be marked. It already is marked?

MR. FLEISHMAN: Yes, your Honor. So actually we would then have 3-a.

THE COURT: I am going to go down this. You have A, A-1 and A-2.

MR. FLEISHMAN: Yes, your Honor. Perhaps for the record, if it is convenient, let me [Vol. 26, 4367] identify those two publications a little more precisely.

THE COURT: I just put "Books, per *Burgin v. U.S.*"

MR. FLEISHMAN: One of them is entitled—a magazine—"Togetherness."

The other is "Flesh and Fancy."

Both of those are referred to in the Lower Court opinion, so I think it would tie in.

THE CLERK: "Fantasy."

MR. FLEISHMAN: I am sorry, "Flesh and Fantasy."

THE COURT: Could I have the spelling of that case, please, Mr. Clerk. It is right on the bottom cover there.

THE CLERK: *B-u-r-g-i-n vs. South Carolina.*

MR. BUTCHER: Which one is "Togetherness"?

THE CLERK: A-1. Will that be marked as to both cases?

MR. FLEISHMAN: Both cases.

THE CLERK: And A-2 is "Flesh and Fantasy."

(Defendants' Exhibits A-1 and A-2 marked for identification.)

MR. FLEISHMAN: And the offer, for the record, would be with regard to the customary [Vol. 26, 4368] limits of candor, with regard to prurient interest, and with regard to the social value.

THE COURT: Well, that again comes within the purview of the *Pinkus* case and of the other matters of comparables which I have ruled on.

MR. FLEISHMAN: Just for the record, then, we would renew our offer with regard to the publication, "Nude Living," your Honor.

This has a twofold purpose. One is for the trial itself. This is Exhibit II, and it is "Nude Living, No. 63."

The Court will recall that this publication first was presented in connection with the subpoena duces tecum that we had served with regard to second class mailing privileges.

This publication does have second class mailing privileges.

We believe it is admissible for purposes of the jury, first of all, on the ground that the Post Office Department, having afforded second class mailing privileges to the magazine, and not having taken any action

to withdraw it, is some indication of acceptability and is relevant and competent on all of the issues [Vol. 26, 4369] with regard to obscenity. So we would renew it for that purpose.

THE COURT: It is marked.

MR. FLEISHMAN: It is also in connection with our objection to the quashing of the subpoena on the second class mailing material, your Honor.

THE COURT: Very well. That has heretofore been denied admission and it is denied now.

* * *

[Vol. 26, 4370] If the Court please, the next document I would like to address myself to are Exhibits QQ and RR. The Court will recall that these publications were first presented to Mr. Getlein in which he testified that some of the illustrations found in either of the magazines—my memory is not precise, but that some of the pictures in at least one of the magazines and possibly both—were similar to material that he had found in the adult book stores in his informal survey and that some of the pictures were not bound in publications in these adult book stores.

We also showed these publications—your Honor will recall—to the witness Dr. Cody Wilson, who testified that with regard to the illustrations that Mr. Getlein said were not available in the adult book stores, Dr. Wilson said that they were, so that there was testimony by a Government witness and by a defense witness concerning these two publications and in terms of the jury even understanding or having the [Vol. 26, 4371] wherewithal to understand the testimony, we would

respectfully submit that those two publications should be admitted. Otherwise, the testimony in the area of the dispute really between the two witnesses will be unknown and unknowable by the jury.

We would also offer them through Dr. Wilson as reflective of what is within customary limits of candor, what is reasonably accepted within the community.

He testified, the Court will recall, that those two publications were reasonably accepted in the community and therefore it meets the condition, very strict condition of admissibility of comparables.

The cases have always held, your Honor, that if you have an expert witness who is able to jump that very difficult hurdle and has enough information with regard to what is reasonably acceptable, then the material that he testifies about would be admissible.

In the *Jacobs* case, the court said there wasn't an expert who was able to bridge that gap. Here we do have and did present to the Court the expert that bridges the gap.

[Vol. 26, 4372] Now I know your Honor is not bound by anything said earlier in the trial or anything like that, but the Court did kind of hold out the possibility that maybe we would be able to get two, three, or four publications before the jury, not more—but we don't even want three or four, your Honor, just two. So it seems to me that such a modest request has to be looked on favorably and therefore we would move into evidence those two publications since there has been a proper foundation laid and it would be extremely helpful to the jury in terms of evaluating the testimony of

both the Government witness and the defense witness who testified about those two publications.

THE COURT: No, I am not going to allow those in. That motion is denied.

* * *

THE COURT: Well, now, wait a minute. Let's get them down here; BC—

MR. FLEISHMAN: Yes.

THE COURT: What is the name of that?

MR. FLEISHMAN: That is a publication entitled, "Deviant Sexual Behavior," [Vol. 26, 4373] BD, a publication entitled, "The Advanced Handbook of Oral Sex," color illustrated, and BE, a publication entitled, "Screw, the World's Greatest Newspaper," and on the top it says, "Do Hairy Men Make the Best Lovers?"

Those, your Honor, were similarly testified to, but they would follow with and be covered by your Honor's ruling to the prior.

THE COURT: Those will be denied. They may be marked for identification.

MR. FLEISHMAN: They have been marked.

THE COURT: But they are denied admittance.

* * *

[Vol. 26, 4412] MR. FLEISHMAN: Yes, your Honor. We have a motion pursuant to Rule 29 for a judgment of acquittal.

THE COURT: All right.

* * *

MR. KATZ: We rest subject to the right to make motions, your Honor.

THE COURT: All right. Make your motion.

[Vol. 26, 4432] Mr. Katz?

MR. KATZ: Thank you. I will try and be brief, your Honor, but I do feel that what Mr. Fleishman has said is very important at this stage of the case.

I, of course, join in the motion to dismiss as to my three clients and I won't discuss the question of obscenity any further. I think Mr. Fleishman has covered it very adequately.

* * *

[Vol. 26, 4441] THE COURT: Let the record show that the defendants are present with their counsel and that the Government attorney is present, that the jury is not present.

I have reviewed your motion, Mr. Fleishman [Vol. 26, 4442] and Mr. Katz, and while perhaps there is a substantial difference in the evidence numerically and in the content, nevertheless the quality and weight to be given to the evidence is not for this Court to determine at this time but for the trier of the fact, the jury, to determine.

It is the Court's position that there is sufficient evidence upon which a jury could find these defendants guilty of the charges set forth in the Indictment and therefore the motions are denied.

* * *

VOL. 29

[Vol. 29, 4915] THE COURT: Let the record show that all twelve jurors are present; that the alternate is present; that all Defendants are present with their respective Counsel and the Government is present.

Members of the Jury: Now that you have heard the evidence and the arguments, it becomes my duty to give you instructions of the Court as to the law applicable in this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rules of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given to you in the instructions of this Court, just as it would be a [Vol. 29, 4916] violation of your sworn duty as Judges of the Facts to base a verdict upon anything but the evidence in the case.

Justice through trial by Jury, must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors and to arrive at a verdict by applying the same Rules of Law as given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations in the Indictment, and you will recall there are two separate Indictments, and the denial made by the

Not Guilty pleas of the accused. You are to perform this duty without bias or prejudice as to any party.

The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

In determining the guilt or innocence of the Defendants, you will be governed solely by the evidence presented during the course of the trial. You must [Vol. 29, 4917] determine the facts only from the evidence received in Court. You must not consider as evidence any statement of Counsel made during the course of the trial. However, if Counsel for the Government and Counsel for the Defendants have stipulated to any fact, you will regard that fact as being conclusively proved.

An Indictment is only a method of accusing a Defendant of a crime. It is not evidence and you are not to infer from it that a Defendant or Defendants are more likely to be guilty than to be innocent. The law presumes each of the Defendants to be innocent of crime; thus, each Defendant, although accused, begins the trial with a clean slate, with no evidence against him, and the law permits nothing but legal evidence presented before the Jury to be considered in support of any charge against the accused.

So, the presumption of innocence alone is sufficient to acquit a Defendant unless the jurors are satisfied

beyond a reasonable doubt of the Defendants' guilt after a careful and impartial consideration of all of the evidence in the case.

It is not required that the Government prove guilt beyond all possible doubt. The test is one of [Vol. 29, 4918] reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must therefore be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

The Jury will remember that a Defendant is never to be convicted on mere conjecture or suspicion. The burden is always upon the prosecution to prove each and every element of the crime charged beyond a reasonable doubt. This burden never shifts to a Defendant, for the law never imposes upon a Defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

A reasonable doubt exists whenever, after a careful and impartial consideration of all of the evidence in the case, the jurors do not feel convinced to a moral certainty that the Defendants are guilty as charged.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence [Vol. 29, 4919] which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive, and

state of mind and demeanor and manner while on the witness stand. Consider the witness' ability to observe the matters as to which he has testified and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses, may or may not cause the Jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently. An innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or to an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, [Vol. 29, 4920] as you may think it deserves.

The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credence. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

The law does not compel a Defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a Defendant to testify. As stated before, the law never imposes upon a Defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Now, throughout this case, there have been many expert witnesses testifying. With respect to the opinions of expert witnesses, the rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, [Vol. 29, 4921] have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter in which they profess to be expert, and may also state their reasons for that opinion.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may completely disregard the opinion of that witness.

During the course of the trial, I occasionally ask questions of a witness in order to bring out facts not then fully covered in the evidence and in the testimony. Do not assume that I hold any opinion on the matters

to which my questions may have related. Remember at all times that you as jurors are at liberty to disregard all comments of the Court, except my instructions of the law, in arriving at your own findings as to the facts in this case.

The testimony of a witness may be discredited or impeached by a showing that he previously made [Vol. 29, 4922] statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness and not to establish the truth of these statements.

It is the province of the Jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached. If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars, and you may reject all the testimony of that witness or give it such credibility as you think it deserves.

There are, generally speaking, two types of evidence from which a Jury may properly find the truth as to the facts of a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the Jury find the facts in accordance with

all the evidence in the case, both [Vol. 29, 4923] direct and circumstantial.

If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable and one of which points to the guilt of the Defendant and the other to his innocence, it is your duty under the law to adapt that interpretation which will admit of the Defendant's innocence and reject that which points to his guilt.

(Indictments read, Case No. 10791—Case No. 11971.) (Title 18, Section 1461, United States Code read.)

This statute was enacted under the power of Congress to establish and operate and regulate the Post Office establishment of the United States of America.

Now, with respect to the law of conspiracy, as that is the first charge:

A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. So, a conspiracy is a kind of partnership in a criminal purpose in which each member becomes an agent of every other member.

The gist of the offense is a combination or agreement to disobey or to disregard the law. Mere similarity of conduct among various persons and the [Vol. 29, 4924] fact that they may have associated with each other or may have assembled together and discussed common aims or interests, does not necessarily establish proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly by word spoken, or in writing, stated between themselves what their object or purpose was to be or the details thereof, or the means by which the object or the purpose was to be accomplished.

What the evidence in the case must show beyond a reasonable doubt in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not establish that all the means or methods set forth in the Indictment were agreed upon to carry out the alleged conspiracy, nor that all the means or methods which were agreed upon were actually used or put into operation, nor that all the persons charged to have been members of the alleged conspiracy were such.

What the evidence in the case must establish [Vol. 29, 4925] beyond a reasonable doubt is that the alleged conspiracy was knowingly formed and that one or more of the means or methods described in the Indictment were agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy as charged in the Indictment and that two or more persons, including one or more of the accused, were knowingly members of the conspiracy as charged in the Indictment.

In order for one to be guilty of a conspiracy, there are four essential elements that are required to be proved to establish the offense of conspiracy as it is charged in the Indictment;

The first is, that the conspiracy described in the Indictment was wilfully formed and was existing at or about the time alleged;

Secondly, that the accused wilfully became a member of the conspiracy;

Third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the Indictment at or about the time and place alleged; and

Fourth, that such overt act was knowingly done in furtherance of some object or purpose of the conspiracy as charged in the Indictment.

[Vol. 29, 4926] If the Jury should find beyond a reasonable doubt from the evidence in the case, that the existence of a conspiracy as charged in the Indictment has been proved, and that during the existence of the consipracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy, then proof of the conspiracy offense charge is complete, and it is complete as to every person found by the Jury to have been wilfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every

essential element of the crime charged, and the law never imposes upon the Defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

One may become a member of a conspiracy without full knowlege of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

Before the Jury may find that a Defendant or [Vol. 29, 4927] any other person has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the Defendant or Defendants, or other person who is claimed to have been a member, wilfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To act or participate wilfully means to act or participate voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done; that is to say, to act or participate with bad purpose, either to disobey or to disregard the law. So, if the Defendant or any other person, with understanding of the unlawful character of the plan, knowingly encourages, advises, or assists for the purpose of furthering the undertaking or scheme, he thereby becomes a wilful participant, a conspirator.

One who wilfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether a conspiracy existed, [Vol. 29, 4928] the Jury should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular Defendant was a member of the conspiracy, if any, the Jury should consider only his acts and his statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy has existed and that he was one of its members.

In your consideration of the evidence in this case, as to the offense of conspiracy charged, you should first determine whether or not a conspiracy existed at all, as alleged in the Indictment. If you conclude that a conspiracy did exist, you should next determine whether or not the accused, all of them or any of them, wilfully became a member of the conspiracy, and when I say the accused, I am including not only the four Defendants here, but the Defendants that are Corporate Defendants.

If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the Indictment was wilfully formed, and that the Defendant or Defendants wilfully became a member of the conspiracy, either at its inception, or afterwards, and that thereafter one or more of the conspirators knowingly committed one or more overt acts in furtherance of [Vol. 29, 4929] some object or purpose of the conspiracy, then there may be a conviction even though

the conspirators may not have succeeded in the accomplishment of their common object or purpose and, in fact, failed in so doing.

The extent of any Defendants' participation, moreover, is not determinative of his guilt or innocence. A Defendant may be convicted as a conspirator even though he may have played only a minor role in the conspiracy.

An overt act is an act knowingly committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy.

The overt act need not be criminal in nature if considered separate and apart from the conspiracy. It may be as innocent an act as a man walking across the street, or driving an automobile, or using a telephone. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the Indictment.

Now, leaving Count 1 of the Indictment Number 10791, which is the San Diego case, and going to the Indictment which is in two counts, the Dallas case, [Vol. 29, 4930] which is our Number 11971 consolidated for trial, you are instructed that this Indictment charges in two counts a violation of Section 1462 of Title 18 of the United States Code and this Section 1462, Title 18 provides in pertinent part as follows:

"Whoever brings into the United States or any place subject to the jurisdiction thereof, or knowingly uses

any express company or other common carrier for carriage in Interstate or Foreign Commerce, any obscene, lewd, lascivious or other filthy book, pamphlet, picture, motion picture film, paper, letter, writing, print or other matter of indecent character, shall be guilty of an offense against the Laws of the United States."

I have informed you as to the Conspiracy Count, as to the Dallas Count. Now, cutting across both Indictments, the essential elements required to be proved beyond a reasonable doubt in order to establish the offense charged in Counts 2 through 5—this is the advertisement count—Counts 7 through 13, again the advertisement count, and Counts 19 and 21. Now, when I refer to these counts, I refer to Counts 2 through 5. These are the counts that allege that the advertisement itself is obscene.

Counts 7 through 13 allege that the advertisement [Vol. 29, 4931] itself is obscene.

Count 19 and Count 21 allege that the book is obscene—

This leaves out the where, when and so forth—as well as in Counts 1 and 2 of the Indictment 11971.

Now, those are the counts that I just read you, the Common Carrier Counts. These essential elements are required to be proved beyond a reasonable doubt in order to establish the offenses in those counts that I have now just told you about:

First, in No. 10791, the San Diego case, the first element is:

That the Defendants willfully deposited or caused to be deposited in the mail, or, in the case of the Texas

case, No. 11971, that the Defendants willfully deposited or caused to be transported in Interstate Commerce via a common carrier, envelopes or packages containing certain materials.

The second element: Going to both Indictments that the Defendants had knowledge of the nature and character of the contents of the envelopes or packages at the time the materials were caused to be transported in Interstate Commerce, the Dallas case via common carrier, or, were deposited in the mail for delivery in the San Diego case.

[Vol. 29, 4932] The third element: That the materials were obscene under the test which I will give you shortly.

Those are the elements that you are to apply. I have already instructed you regarding the elements of the offenses charged in Counts 2 through 5—that is the advertisement count—alleging that the advertisement itself is obscene; Count 7 through 13 alleging that the advertisement itself is obscene; Counts 19 and 20—all of the San Diego case—alleging that the book is obscene and I have also now charged you with respect to the elements of the Dallas case, No. 11971.

Now, with respect to the elements charged under Counts 15, 16 and 17 of the San Diego case, No. 10791, these are somewhat different. Before you can convict any Defendant under any of these counts, Counts 15, 16 and 17, the Government must prove beyond a reasonable doubt the following:

1) That he knowingly used or caused to be used the mails for carriage in the mail of the envelope in

question and its contents. That is the envelope that carried the advertisement;

2) That the envelope contained a printed advertisement giving information where, how, and from whom —and by what means, the Illustrated Presidential [Vol. 29, 4933] Report of the Commission on Obscenity and Pornography might be obtained; and

3) That the book about which the information was given was, in fact, obscene.

In this regard, you are to be guided by the instructions which I give you for the purpose of arriving at a determination of whether or not the book is, in fact, obscene.

I further instruct you, however, that it is not an element of the offense charged in Counts 15, 16 and 17, that the advertisement itself is obscene, and this is true even though other identical brochures are, in fact, charged as being obscene in Counts 2 through 5 and Counts 7 through 13.

Now, what that means is this. If the book is determined to be obscene—and if you determine that the advertisement meets these tests that I have just stated beyond a reasonable doubt, then the Defendants would be guilty as charged.

If, on the other hand, the book is determined not to be obscene, there is no way that the Defendants could be convicted of Counts 15, 16 and 17, even if you believed the advertisements themselves to be obscene.

On the other hand, if you believe the advertisements [Vol. 29, 4934] themselves to be obscene, the book not

to be obscene, then the Defendants would be guilty of Counts 2 through 5 and Counts 7 through 13 and then the conspiracy charge, Count 1, as I have instructed you, is an entirely different charge.

The statute involved here prohibits the mailing of any obscene, lewd, lascivious, indecent, filthy and vile material.

The jury is instructed that the words "lewd," "lascivious", "indecent", "filthy" and "vile", do not add to the class of material established as non-mailable by the word "obscene". In other words, under the law, the words, "lewd", "lascivious", "indecent", "filthy" and "vile" and "obscene" are deemed synonymous, and if the material is not obscene, as the Court has and will define obscenity to you, then the verdict must be in favor of the Defendants.

Now, briefly a word with regard to the Corporate Defendants and then we will conclude. As I said, of necessity, this has to be broken up, because it is long. Some of the Defendants are corporations. A corporation is a legal entity or person, and a corporation may be found guilty of a criminal offense. A corporation, of course, may only act through natural persons who are known as its agents.

[Vol. 29, 4935] In general, any agent or representative of a corporation possessing adequate authority may bind the corporation by his acts, declarations, and omissions. In order to find a Corporation Defendant guilty, you must find that all the essential elements of the offense, as set out in these instructions, are present as to the corporation or corporations in the form of

acts or omissions of agents of the corporation within their authority.

The scope of authority of these agents is a question of fact for you to decide just as any other fact question in the case, just as in the case of an individual Defendant, the burden is on the Government to establish guilt of a Corporate Defendant beyond a reasonable doubt.

As a general rule, whatever any person is legally capable of doing himself can be done through another as his agent. So, if the acts of an employee or other agent are voluntarily and intentionally ordered or directed, or authorized or consented to by a person, then the law holds that person responsible for such acts, the same as if the acts had, in fact, been done by such person.

A corporation is in law a person, but, of course, it cannot act otherwise than through its directors [Vol. 29, 4936] or officers or employees or other agents. The law therefore holds a corporation responsible for all unlawful acts of its directors or officers or employees or other agents, provided such unlawful acts are done within the scope of their authority as would usually be the case if done in the ordinary course of their employment or in the ordinary course of their corporate business.

The authority to act for a corporation in a particular matter or in a particular way or manner, may be inferred from the surrounding facts and circumstances shown by the evidence in the case. That is to say, authority to act for a corporation, like any other fact

in issue in any action, need not be established by direct evidence, but may be established by indirect or circumstantial evidence.

Every act of every director or officer or employee or other agent on behalf of or in the name of a corporation, if done within the scope of his authority, is in law the act of the corporation itself.

An officer of a corporation cannot be held criminally responsible for an act unless he personally or actually did the act or the acts were done by others at his direction or with his permission.

VOL. 30

[Vol. 30, 4940] THE COURT: Let the record show that all twelve jurors are present in the jury box and that the alternate is also present and that the Defendants are present with their respective Counsel.

Ladies and Gentlemen of the Jury: When we concluded with the instructions, it had gotten as far as the elements of the offense as related to both of the two cases.

In expanding on the elements of the offense, I think that it is necessary that additional instructions be given in that regard, but before I do so, there was a reference made yesterday to the counts that had been dismissed. That is not exactly correct.

[Vol. 30, 4941] There are certain counts in the San Diego Indictment that were withdrawn by the Government and those are not for your consideration at this time.

To constitute the crime charged, the conspiracy crime charged, or to constitute any crime charged in the Indictment, there must be a joint operation of two essential elements: An act forbidden by law and an intent to do that act.

With regard to the crime of Conspiracy, and with regard to the other crimes, the mailing statute crimes, which I will go into a little further, the crime charged in this case is a serious crime which requires proof of specific intent before the Defendants can be convicted.

Specific intent, as the term implies, means more than a general intent to commit the act. To establish specific intent, the Government must prove the Defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

An act or failure to act is done knowingly if it is done voluntarily and intentionally and not because of mistake or accident or other innocent reason. The Government must prove beyond a reasonable doubt that [Vol. 30, 4942] the Defendants acted with knowledge before there may be a conviction. This is to insure that no Defendant will be convicted because of innocent mistake or accident or inadvertence.

The requirement of knowledge in this case applies both to placing the subject material in the mails or in Interstate Commerce and to the Defendants' knowledge as to the contents of the envelopes and packages, and that is the intent required. That is to say, it must be proven beyond a reasonable doubt that:

First, the Defendants knew the envelopes and packages containing the subject materials were mailed or placed aboard a common carrier for carriage in Interstate Commerce, and

Second, that they had knowledge of the character of the materials.

In considering whether or not the Defendants had knowledge of the character of the materials, you may consider all pertinent evidence in the case. You may consider all of the circumstances in the case and all inferences reasonably drawn from the evidence to determine whether or not the Defendants acted with the requisite knowledge.

You must be satisfied beyond a reasonable doubt [Vol. 30, 4943] that the Defendants were aware of the character and the nature of the materials alleged to have been mailed or transported in Interstate Commerce.

The Defendants' belief as to the obscenity or non-obscenity of the material is irrelevant. You must also find beyond a reasonable doubt that the Defendants wilfully deposited or caused to be deposited for mailing and delivery in a Post Office establishment of the United States or caused to be transported in Interstate Commerce via a common carrier, envelopes and packages containing obscene materials.

Proof as to wilfully depositing or causing to be deposited for delivery may be wholly circumstantial. The evidence need not show that the Defendants personally mailed or placed the alleged package with a common

carrier. It is enough if the evidence in the case establishes beyond a reasonable doubt that the Defendants wilfully caused the deposit for mailing or carriage by a common carrier of a packet containing obscene materials as charged in the Indictment.

An act is wilfully done, as I have stated before, if it is done voluntarily and intentionally and with the specific intent to do something the law forbids or in this case, with the specific intent or [Vol. 30, 4944] knowledge of the contents of the package.

Proof of intent: Insofar as the proof of intent is concerned, while witnesses may see and hear and so be able to give direct evidence of what a Defendant does, there can be no eyewitness account of the state of mind with which the acts were done. Therefore, intent may be proved by circumstantial evidence. It rarely can be established by any other means.

Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind, but you may infer the Defendants' intent from the surrounding circumstances. You may consider any statement made or done or omitted by the Defendant and all other facts and circumstances in evidence which indicate his or her state of mind.

It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. Intent and motive should never be confused.

Motive is what prompts a person to act or fail to act. Intent refers only to the state of mind with which

the act is done or omitted. Personal advancement and financial gain are two well recognized [Vol. 30, 4945] motives for much of our human conduct. These laudible motives may prompt one person to voluntary acts of good and another to voluntary acts of crime. Good motive alone is never a defense where the act done or omitted is a crime. So, the motive of the accused is immaterial, except insofar as the evidence of motive may aid determination of the state of mind or intent.

Now, with respect to the matter of obscenity. The test of whether any material is obscene is as follows:

Whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient interest. Under this definition, three elements must coalesce:

1) The dominant theme of the material taken as a whole appeals to the prurient interest of the average person;

2) The material is patently offensive in that it goes substantially beyond contemporary national community standards relating to the description or representation of sexual matters; and

3) The material is utterly without redeeming social value.

[Vol. 30, 4946] Now, what is prurience? Material that appeals to prurient interest is material that has a tendency to excite lustful thoughts. Prurient is defined as itching, longing, uneasy with desire or longing, morbid or lascivious longings. Prurient interest does not

mean a mere interest in sex or a mere arousal of sexual interest. Prurient interest is a shameful or morbid interest in sex or nudity, and you must measure this appeal by the average or ordinary adult or by a clearly defined deviant group, as will be explained elsewhere.

If the material is calculated either by the physical actions it portrays or suggests, or by the focus of attention or the details and manners of portrayal to appeal to and excite in the viewer shameful, morbid, degrading, unhealthy or unwholesome interest in sex, or in details about sex, you should find it appeals to the prurient interest in sex.

In determining whether material appeals to a prurient interest, you should consider not only what is portrayed, but the way it is portrayed, and the way it is used, or the way it is described. The materials here involved must be measured by its appeal to the average adult. The average adult is, of course, determined by the synthesis of the entire [Vol. 30, 4947] community, including persons of all sexes, religions, nationalities, creeds, ages and et cetera, but once the Jury has determined the average adult, it must be remembered that the materials must be measured by such average adult and not by young persons or those persons highly susceptible thereto.

In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of sexual interest of the intended or probable recipient group. This group must be a clearly defined sexually deviant group.

An example of a group not sufficiently defined would be one labeled as sexually immature. I suppose one clearly defined would be homosexuals.

It is not necessary for satisfaction of the prurient appeal requirement that you find one specific type of sexual activity to constitute the dominant theme of the materials under consideration. The prurient appeal requirement is satisfied if you find the dominant theme of the materials to be one of an appeal to an inordinant, shameful, morbid, degrading, unhealthy and unwholesome interest in sex, and details concerning sex, regardless of the type of group to which the appeal is made.

There are depicted throughout the materials [Vol. 30, 4948] under consideration, various sexual activities that may or may not be found to be deviant, that may have prurient appeal, depending upon the particular sexual interest of the viewer, whether normal or deviant.

You need not limit your inquiry to whether the dominant theme of the material appeals to the prurient interest in sex of the average person. You may also consider whether some of the materials involved are designed for a clearly defined deviant sexual group, and whether such material appeals to the prurient interest in sex of the members of that group.

Consequently, if you find that some of the material appeals to the prurient interest of the average person, and some of the material appeals to the prurient interest of a deviant sexual group, that fact would not preclude your finding that the dominant theme of the material

taken as a whole is, generally speaking, one of an appeal to the prurient interest, as has been previously defined in the broad sense.

Now, as to the second test, another requirement to be applied in determining whether the material in evidence is obscene, is whether the material is patently offensive in that it goes substantially beyond what is reasonably accepted according to the contemporary standards of the community as a whole, [Vol. 30, 4949] the national community as a whole. In applying this test you must consider each book or advertisement as a whole and not part by part. You must measure the material by contemporary or current national community standards and determine whether the material so exceeds the customary limits of candor in the descriptions and representations of sex and nudity which are reasonably acceptable in the national community, that they are patently offensive.

Contemporary community standards means the standards generally held throughout this country concerning sex and matters pertaining to sex. The phrase means, as it has been aptly stated, the average conscience of the time, and the present critical point in the compromise between candor and shame, at which the community may have arrived here and now.

You are the sole judges of the contemporary community standards of this country. In arriving at and applying your judgment, however, you are not to consider your own standards. That is, of what is good or what is bad. You are not to condemn by your own standards, if you know and believe them to be stricter

than those generally held, and you are not to exculpate or excuse by your own standards, if you know and believe them to be more tolerant than those that are generally [Vol. 30, 4950] held. You are not to limit yourself to what you have learned while residing in your present locality or what you have learned or observed from and about people residing in your present locality. Rather, you are to call upon everything you have learned, seen, read, and observed from both the evidence presented at the trial and the experience you have gained from your own observations and experience in your affairs of life.

If you find the materials in evidence to substantially exceed the limits of candor in the descriptions and representations of sex which are acceptable in the national community, then you may find the material to be patently offensive.

You will note that the book and advertisement here involved cannot be found to be obscene unless the evidence shows beyond a reasonable doubt that these materials substantially exceed customary limits of candor in the nation as a whole in the description and representation of sex and nudity.

The word "substantially" has been defined as greatly or considerably, or largely. The contemporary community standards of the nation, are set by what is, in fact, reasonably accepted by the national community as a whole. That is to say, by society [Vol. 30, 4951] at large or people in general throughout the nation, and not by what some persons or groups of persons may believe the national community as a whole ought

to accept or refuse to accept. It is a matter of common knowledge of which the Court takes judicial notice, that the customs change and that the national community as a whole may, from time to time, find acceptable that which was formerly unacceptable.

Now, in determining and applying contemporary national community standards, you must consider what appears generally in magazines, books, newspapers, television, burlesque, night clubs, novels, motion pictures, the stage, and other media of communications in the nation as a whole, insofar as social value is concerned.

The Third Element: The next test to be applied is whether the books or advertisements are utterly without redeeming social value. The material cannot be branded obscene unless it is found to be utterly without redeeming social value. This is so even though the book or magazine is found to possess the requisite prurient appeal and to be patently offensive. As I explained, all three elements must coalesce.

Obscenity is excluded from constitutional protection of the First Amendment because it is utterly [Vol. 30, 4952] without redeeming social importance. Obscene utterances are not an essential part of an exposition of ideas and are of such slight value as a step to thought that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Of course, the mere fact that material deals with sex does not mean that it cannot have value to society. Indeed, some material can have social importance if it portrays sex in a manner that advocates ideas and that has literary, scientific, or artistic value.

It is for you to determine whether the materials at issue in this case are of value to society. Only if you find that they are utterly without redeeming social value—social importance—can you brand them obscene. Material has social value if it has the capacity to broaden man's range of sympathies and consciousness or to enable him to see, hear, or appreciate what he might otherwise have missed, or deepens his emotions or makes his life seem richer, more interesting, or more comprehensible, or offers entertainment or provides insight into man's relationship to the society in which he lives. Materials may have social value even if it appears worthless to the average person or to most people.

[Vol. 30, 4953] The Court has instructed you that material may not be condemned as obscene unless it substantially exceeds contemporary national community standards, appeals to prurient interest, and is utterly without redeeming social value.

The word "redeeming", in the context herein, refers not to a balancing of the alleged prurience against the social importance of the material, but rather, to the presence of matters of social value in the content which will recover for the material its position as constitutionally protected.

Under the law, the word "utterly", which appears in the definition, has been defined in law as follows:

"To an absolute or extreme degree, to the full extent, absolutely, altogether, entirely, fully, thoroughly, totally."

Having covered the three elements of obscenity, there is one additional matter that you may consider

and that is the matter of pandering. You must make the decision whether the materials are obscene under the test I have given you. In making this determination you are not limited to the materials themselves. In addition, you may consider the setting in which they were presented. Examples of what you may consider in this regard are such things as: Manner of distribution, [Vol. 30, 4954] circumstances of production, sale, and advertising. The editorial intent is also relevant. What you are determining here is whether the materials were produced and sold as stock in trade of the business of pandering. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer. It is a deliberate representation of publications as erotically arousing, an attempt at titillation, rather than saving intellectual content.

The question of obscenity is to be answered by application of the basic test recited earlier, but if you find this to be a close case under that test, then you may consider the evidence of pandering to assist you in your decision. Such evidence is pertinent to all three elements of the basic test of obscenity.

The circumstances of presentation and dissemination of material are especially relevant to a determination of whether the social importance claimed for the material is pretense or reality, whether it was the basis upon which it was traded in the market place or a spurious claim for litigation purposes. Where the distributors' sole emphasis is on the sexually provocative aspects of [Vol. 30, 4955] the publications, that fact may be decisive in the determination of obscenity.

An item may have social value in one circumstance, yet not in another. For example, a scientific publication containing graphic sexual depictions would not be obscene if distributed in a controlled or neutral environment. The same publication, however, indiscriminately distributed, with a deliberate emphasis on the sexually provocative aspects of the work, might be found to be obscene.

In summary, evidence of pandering simply is useful in applying the basic obscenity test where an exploitation of interest in titillation by pornography is shown with respect to the material lending itself to such exploitation through pervasive treatment or description of sexual matters. Such evidence may support the determination that the material is obscene, even though, in other context, the material would escape such condemnation.

There has been evidence introduced in this case to show that the individuals purchasing the books charged as obscene in Counts 19 and 21 of Criminal Number 10791, which is the San Diego case, were adults who willingly consented to purchase and did, in fact, [Vol. 30, 4956] purchase the books in question. The fact that the individuals making such purchases, all of whom were Law Enforcement Officers, were indeed adults, is of no relevance in this case. The fact that they were adults is not relevant in this case. If the material involved is found by you to be obscene, and if, in fact, it was knowingly deposited by these Defendants, including the corporations, for movement in the United States Mails, and the Defendants had

knowledge of the character of the materials, then the offense has been proven irrespective of whether or not such activity was taken pursuant to the acceptance by a Law Enforcement Agent of the offer for sale, which had previously been made by any of these Defendants or all of them.

Now, a word about the First Amendment Rights. The First and Fourteenth Amendments to the Constitution of the United States guarantee freedoms of speech and press. It is a basic guarantee of the First Amendment that one is free to advocate ideas. With respect to the nature of the ideas, they may be the widest variety, including the unorthodox, the controversial, or even ideas hateful to the prevailing climate of opinion, but unless they are integrated with unlawful conduct, such ideas have the full [Vol. 30, 4957] protection of the guarantees of the First Amendment.

The guarantee of the Constitution is not confined to the expression of ideas that are conventional or shared by the majority. No media of communication, including books and advertisements, such as are involved in this case, may be deemed obscene merely because they are distributed and sold commercially.

The book, the Illustrated Presidential Report of the Commission on Obscenity and Pornography, has been charged with being obscene. That means, you must consider the book as a whole, including all of the writing therein. You may not consider the pictures in isolation. To do so would be a violation of the Constitutional guarantees which provide that the book may

not be condemned because a portion thereof, considered in isolation, may be thought to offend the law.

A book or advertisement, under the law herein, cannot be judged merely by the effect of an isolated scene upon a particularly susceptible person. Judging obscenity by the effect of isolated scenes upon most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of [Vol. 30, 4958] speech and press.

You have been instructed that you have a duty to follow the law as I gave it to you. Part of that law, as stated, is that you must consider the book as a whole, including the writing, in making the determination of whether or not the book and the advertisements are obscene. The book, in this case, contains opinions of what the law is and what the law ought to be. That is unique. You may consider those opinions in the sense of whether or not they, by the very fact that they are opinions, add to the overall social value, if any, of the book, but you are not to consider any statements of law as being the law if it is contrary to the law as I have stated it to you. In other words, any statement in the book that claims to represent what the law is, must not be considered by you as a source of law to be applied in this case.

The source of law to be applied in this case comes from me. Also, any statement claiming to represent what the law was in the past or ought to be in the future, must not be considered by you as relevant, as it is irrelevant to this particular case.

Only the instructions I give you from the bench are the law. They alone must be applied by you to the facts of the case in order to arrive at your [Vol. 30, 4959] verdict.

The book in this case also contains various findings and recommendations of the Commission and individual members thereof. Here again, you may consider these findings and recommendations for whatever value they may have as ideas in determining whether or not the book, taken as a whole, has redeeming social value, but the substance of those findings and recommendations—that is, what was allegedly found to be true—and what recommendations were actually made pursuant to those findings, are of no concern to you in this case, except as stated above.

Their truth or their falsity has not been an issue in this trial and is irrelevant to the findings that you, the Trial Jury, must make on the question of whether or not the book is obscene. Equally as well, your own personal and social views on the material, such as that charged in the Indictment, may not be considered, the material being the book and the advertisements.

Thus, whether you believe that the book and the advertisements are good or bad is of no concern. So, too, you must not consider whether, in your opinion, the book and advertisements are moral or immoral, [Vol. 30, 4960] whether they are likely to be helpful or injurious to public morals.

Similarly, whether you like or dislike the book and advertisements, whether they offend or shock you, may not be considered by you. You may think the book

and the advertisements are immoral, shocking or offensive, and you must acquit the Defendants if the book and advertisements are not obscene as the Court has defined that term to you.

Do not apply your own standards, as I have tried to explain to you. You apply the standards throughout the nation. What you find the standards to be throughout the nation, I think is probably a better statement.

The Court may take judicial notice of certain facts or events. When the Court declares it will take judicial notice of some fact or event, you may accept the Court's declaration as evidence and regard as proved the fact or event which has been judicially noticed, but you are not required to do so, since you are the sole Judges of the Facts. You may take it, but you are not required to accept if.

Now, with respect to the evidence in this case, you are to consider only the evidence in the case, but in your consideration of all of the evidence [Vol. 30, 4961] in the case, you are not limited to the bald statements of witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw from facts which you find to have been proved, such reasonable inferences as you feel are justified in the light of experience. Unless you are otherwise instructed, anything you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded.

It is the duty of the attorney on each side of the case to object when the other side offers testimony or other evidence which the attorney believes is not prop-

erly admissible. You should not show prejudice against an attorney or his client because the attorney has made objections. Upon allowing testimony or other evidence to be introduced over the objection of an attorney, the Court does not, unless expressly stated, indicate any opinion as to the weight or the effect of such evidence.

As stated before, the jurors are the sole judges of the credibility of all of the witnesses and the weight and effect of all of the evidence. When the Court has sustained an objection to a question addressed to a witness, the Jury must [Vol. 30, 4962] disregard the question entirely and may draw no inference from the wording of the question and may not speculate as to what the witness would have said if the question had been answered.

If a lawyer asks a witness a question which contains an assertion of a fact, you may not consider the assertion as evidence of that fact. The lawyer's statement is not evidence.

It is the duty of the Court to admonish an attorney who out of zeal for his cause, does something which is not in keeping with the rules of evidence or rules of procedure. You are to draw no inference against the side to whom an admonishment of the Court may have been addressed during the course of the trial of this case.

There is nothing peculiarly different in the way a Jury should consider the evidence in a criminal case from that in which all reasonable persons treat any questions depending upon the evidence presented to them. You are expected to use your good sense. Con-

sider the evidence in the case for only those purposes for which it has been admitted and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

[Vol. 30, 4963] If the accused be proved guilty, say so. If not proved guilty, say so.

The punishment provided by law for the offense or offenses charged in the Indictment is a matter exclusively within the province of the Court and should never be considered by the Jury in any way in arriving at a fair and impartial verdict as to the guilt or innocence of the accused.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for himself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors.

In the course of your deliberations, do not hesitate to re-examine your own views or change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of arriving at a verdict.

[Vol. 30, 4964] Remember at all times you are not partisans, you are judges, Judges of the Facts. Your

sole interest is to seek the truth from the evidence in the case.

A separate crime or offense is charged against each of the Defendants in each count of the Indictment. Each offense, the evidence pertaining to it, should be considered by you separately. The fact that you may find one or more of the Defendants guilty or not guilty of one or more of the offenses charged in the Indictment, should not control your verdict as to any other offense charged against any of the other Defendants.

It is your duty to give separate and personal consideration to the case of each individual Defendant, that includes the corporations. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of your consideration—entirely—any evidence admited solely against some other Defendant or Defendants. Each Defendant is entitled to have his case determined from evidence as to his own acts and statements and conduct and any other evidence which may be applicable to him.

Unless otherwise stated, the Jury should consider each instruction given to apply separately [Vol. 30, 4965] and individually to each Defendant on trial.

Upon retiring to the jury room, you may and will select one of your number to act as Foreman. The Foreman will preside over your deliberations and will be your spokesman here in Court.

The Court has provided a form of verdict for you and of necessity, they are lengthy. With respect to the Texas case:

First, it is under our number and it is headed, "The United States District Court, Southern District of California," because it now becomes our case, having been consolidated for trial.

"Case Number 11971, United States of America, Plaintiff, versus William L. Hamling, Defendant.

We, the Jury in the above entitled cause, find the Defendant William L. Hamling," and then you will cause your Foreman to insert the word, "Guilty" or "Not Guilty"—"of knowingly using a common carrier for carriage in Interstate Commerce of obscene books as charged in Count 1 of the Indictment", and then there is a blank space and you will cause your Foreman to insert "Guilty" or "Not Guilty"—"of knowingly using a common carrier for carriage in Interstate Commerce of obscene books as charged in Count 2 of the Indictment."

[Vol. 30, 4966] The Foreman will then, upon arriving at a verdict, sign the verdict and date the verdict.

Now, the verdict for Greenleaf Classics is identical and the verdict for Reed Enterprises is identical. These are the three verdicts of the three charged Defendants in the Texas case, Number 11971.

In the San Diego case, Number 10791, we have caused to be prepared a total of seven verdicts, one for each of the seven Defendants alleged in that particular Indictment. I will not go through each of the seven. I will simply go through one of them.

The verdict form reads:

"The United States District Court, Southern District of California; United States of America, Plaintiff, versus

Earl Kemp, Defendant, Case Number 10791; Criminal Verdict.

We the Jury in the above entitled cause find the Defendant, Earl Kemp", and then there is a blank space. You will insert the word "Guilty" or "Not Guilty" . . . "of", and then it goes right down by counts, "conspiracy to use the United States Mails for the mailing and carrying in the mails of non-mailable matter as charged in Count 1 of the [Vol. 30, 4967] Indictment";

And you will insert the word "Guilty" or "Not Guilty" . . . "of knowingly using the mails for mailing an obscene advertisement as charged in Count 2 of the Indictment";

And "Guilty" or "Not Guilty" . . . "of knowingly using the mails for mailing an obscene advertisement as charged in Count 3 of the Indictment";

And "Guilty" or "Not Guilty" . . . "of knowingly using the mails for mailing an obscene advertisement as charged in Count 4 of the Indictment";

And "Guilty" or "Not Guilty" . . . "of knowingly using the mails for mailing an obscene advertisement as charged in Count 5 of the Indictment";

And "Guilty" or "Not Guilty" . . . "of knowingly using the mails for mailing an obscene advertisement as charged in Count 7 of the Indictment";

And "Guilty" or "Not Guilty" . . . "of knowingly using the mails for mailing an obscene advertisement as charged in Count 8 of the Indictment";

And "Guilty" or "Not Guilty" . . . "of knowingly using the mails for mailing an obscene advertisement as charged in Count 9 of the Indictment";

And "Guilty" or "Not Guilty" . . . "of knowingly using the mails for mailing an obscene advertisement [Vol. 30, 4968] as charged in Count 10 of the Indictment";

The same for Count 11 and the same for Count 12 and the same for Count 13.

In Count 14, "Guilty" or "Not Guilty"—"of knowingly using the mails for carriage of an advertisement giving information of where, how and from whom and by what means an obscene book might be obtained";

And "Guilty" or "Not Guilty"—"of knowingly causing to be delivered said envelope and its contents as charged in Count 15 of the Indictment";

Count 16 is the same; Count 17 is the same.

Count 18 you would cause your Foreman to insert the word "Guilty" or "Not Guilty"—"of knowingly using the mails for carriage of an obscene book as charged in Count 19 of the indictment";

And Count 21 is the same.

When you have arrived at a verdict—have been filled in as I have indicated, you will cause your Foreman to sign the verdict and date the verdict. There is one verdict here for each of the seven Defendants alleged in the San Diego Indictment.

Now, perhaps it is proper at this stage, Ladies and Gentlemen, to add the caution that nothing said in

these instructions and nothing in any form of verdict prepared for your convenience is to suggest or [Vol. 30, 4969] convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of each and every one of you as jurors in this case.

* * *

THE COURT:

Now, for the purposes of the record, Mr. Fleishman, your objections—all of your objections to the instructions have heretofore been noted and I said that I would give note to that fact before I concluded the instructions.

Do you have any comments to make?

[Vol. 30, 4970] MR. FLEISHMAN: Yes, Your Honor.

I think the matter is at this stage very sensitive with the Jury here. I would suggest it wouldn't take long, perhaps not more than four or five minutes, but I would urge the Court to ask the Jury to go into the jury room while we present it.

I gather that sometimes words drift over to the Jury at this stage of the proceedings.

THE COURT: You have made all the objections suitable that I can think of. I want to send this Jury out. If you want to make a statement, make a statement.

MR. FLEISHMAN: I would ask the Court if it is convenient, that they be excused for a few moments.

THE COURT: No.

MR. FLEISHMAN: First of all, with regard to the social value, Your Honor referred to the book and magazine rather than the book and advertisement. I think that has to be corrected. You said book and magazine, the social value test applies. I know it was a mistake in reading. At least, that is what I heard. I think that ought to be corrected.

THE COURT: All right.

MR. FLEISHMAN: In instructing the Jury on expert witnesses, Your Honor has in effect told the [Vol. 30, 4971] Jury, as I heard it, that they may disregard the testimony of the expert witnesses even if they find that the experts are honest people and know what they are talking about.

I don't believe that is the law. I think the Jury is required to give weight to the expert opinion of expert witnesses and may not disregard them once they find that the experts have been testifying truthfully. They may, if they find they are an untruthful witness, disregard them, but if they are testifying truthfully, it is contrary to the law to tell the Jury, as Your Honor has, that they may disregard the expert opinion of witnesses.

Next, Your Honor gave an instruction which said that the number of witnesses was totally irrelevant, or I believe that is the import of what the instruction was. This is a mistake.

It is true that if there are more witnesses on one side, that need not be determinative, but the fact that there are more on one side is, on the other hand, of some weight. I think that Your Honor has taken

away from us unfairly what we are properly entitled to. Witnesses have been called; more witnesses than the Government did.

With regard to the Texas case, Your Honor [Vol. 30, 4972] used the term "indecent character". I believe that term in that statute, the Interstate Commerce Statute, rather than the Mailing Statute—the language is different. There was no use of the term "indecent character" in the Mailing Statute.

When Your Honor was talking about the Texas case, Your Honor did refer to "indecent character".

There was no statement made by Your Honor to the Jury: Indecent character has no meaning different than the term "obscene". Your Honor did do that with regard to the mailing statute aspect of the case, where Your Honor did say "lewd and lascivious" and the like—obscenity only, but on indecent character, the language is different in the two statutes.

Your Honor has instructed the Jury that they had to have knowledge of the character of the material. Your Honor at no time instructed the Jury what that means. We have previously made our position clear, and we repeat it, of course.

THE COURT: We understand.

MR. FLEISHMAN: We believe that it means at least the obscene character.

With regard to the instruction as to where, how and from whom, the sections, we previously pointed out our objection to the fact that there was no reference [Vol. 30, 4973] there, even to the Defendants' actual knowledge of the character of the book. Your

Honor said there were only three elements there: Knowingly used the mail, advertising, giving information, and that the book is obscene.

We believe there has to be the additional requirement that the Defendants knew the book to be obscene, under Your Honor's instruction. They would have to know the character of the book which was mailed pursuant to where, how and from whom the advertisement was mailed.

Then Your Honor did something which I believe is very harmful to the Defendants. After Your Honor had told the Jury that under this count of the Indictment, they need not find the advertisement to be obscene, Your Honor went on to say that, if you find the advertisement to be obscene, and the book not obscene, then they could find the Defendants guilty under the earlier counts.

THE COURT: That is correct.

MR. FLEISHMAN: Well, it is correct except, Your Honor, they referred to the knowledge that at that point they found it obscene without their knowing the "character". We should define "character" at that point. Your Honor told the Jury less than the [Vol. 30, 4974] essential elements even as Your Honor had given it. It was, perhaps, an inadvertent statement, but you told them that if they found the advertisement obscene, and the book not obscene, they could convict.

MR. BUTCHER: Counsel, he also forgot to mention mailing, but I don't think anyone was confused.

MR. FLEISHMAN: We specifically object to Your Honor's instruction that the belief on the part of the Defendants that the material is not obscene is absolutely irrelevant. It may not be a complete defense as we believe it to be, but we think it is relevant. All of the cases hold at least good faith—belief it was not obscene has a relevance to the case. That that statement is a misstatement of the law, even if Your Honor doesn't accept our position. That the knowledge of obscenity or good faith—belief in non-obscenity is an absolute defense, that certainly is not irrelevant. It certainly would at least be relevant with regard to the so-called pandering instruction.

On the issue of obscenity, Your Honor told the Jury that the material appeals to prurient interest if it has a tendency to excite lustful thoughts. The "tendency" is much too broad, Your Honor. It has to be proof beyond a reasonable doubt that it does—in [Vol. 30, 4975] fact—arouse these lustful thoughts. "Tendency" is too loose and too vague. We would object to that.

We object on prurience, Your Honor, on Line 17. Your Honor said, "If the Jury 'should find' "—should find that it appeals to a prurient interest in sex, this is an over statement. Not "may", but "should" as a requirement—appeal to shameful and morbid interest, and a lot of other interest, and all of these things have to do with what may be, but the "should", I believe, is stating it stronger than the law is, and unfairly to the Defendants.

Your Honor had put into the instructions something that we were not advised of at the time we were arguing. At that time, the only instruction that I was aware of was that Your Honor was going to instruct that a clearly defined sexually deviant group was not a sexually immature group. Your Honor did say here to the Jury—after I had argued—that homosexuals is a clearly defined group. I think—I know we were prejudiced by that, Your Honor. If I knew the Court was going to instruct that way, I would have wanted to and I would have argued with regard to that matter.

To that entire aspect—very briefly—with [Vol. 30, 4976] regard to instructing on the sexually deviant group, we object for the reasons previously stated, but in its simplest form, that it was not charged in the Indictment. It was not charged in the Bill of Particulars when we asked whether the material was charged as appealing to the average person. In the Bill of particulars—

THE COURT: You have already made all those objections.

MR. FLEISHMAN: In the Bill of Particulars only. There is no evidence which would support the giving of such instructions.

Then, the Court compounded it, Your Honor, by saying that the book and the advertisement could be found guilty of prurient interest if it appealed to the prurient interest of the average person or any of the undefined group of sexually deviant groups—appeal to the prurient interest of one sexually deviant group or

of another, so to still a third deviant group. This is unconstitutional according to the testimony.

With regard to the pandering instruction, again we object for the reasons previously stated. The Bill of Particulars did not charge pandering at all, and there was no evidence of pandering. The [Vol. 30, 4977] way Your Honor gave the instruction, it was just a one-way street. Your Honor did not give, as Your Honor should have, both sides of the coin.

That is to say, pandering is a charged word. If Your Honor is going to instruct that the circumstances of production, distribution and the like is relevant, that would be relevant both ways. There is an editorial format that would in a close case tend to show that the material is not obscene. Your Honor presented it as if the circumstances were only to be viewed adversely to the Government.

We feel that if Your Honor is going to give an instruction to the circumstances and the like, that those circumstances may tend to show that the material under the circumstances that it was produced and the like, show that it is not obscene.

A perfect example of that, Your Honor, is that after you told the Jury that the circumstances of distribution may be considered and taken into account, then Your Honor went on to say that the fact that the material was distributed to consenting adults—that is to say, Postal Inspectors who were twenty-one years of age, and who said they were twenty-one years of age and who, in the order form they had signed, said that they were twenty-one and said they wanted it

only for [Vol. 30, 4978] their own private use in the privacy of their own home—Your Honor said that is wholely irrelevant. If circumstances of distribution are relevant, they are relevant both ways. That would be relevant in the Defendants' favor on that side of the score, Your Honor.

To use the term "pandering"—which is emotionally charged—against us and then to focus upon all of those factors which would have a negative implication and omit from the Jury's consideration those factors which would have a positive implication for the Defendants, is error, and denies the Defendants due process of law.

Beyond that, Your Honor, as we have said before, we object to Your Honor's failure to give instructions we tendered on the sexual [essential] elements; that is to say, just briefly, on knowledge.

Our theories are quite different on the obscenity, as we have proposed it, and on the conspiracy, where we have tendered a large number of instructions which have tied the notion of conspiracy to circulation of the press which we believe has different consequences than a normal conspiracy case.

In short, Your Honor, we object to the instructions given by the Court as denying to the [Vol. 30, 4979] Defendants due process of law and denying rights to freedom of speech and press secured by the First Amendment.

We would object to the refusal of the Court to give the instructions we requested on the same grounds, and we would ask the Court now to make those cor-

rections that the Court thinks is appropriate after our having called them to the Court's attention. Thank you.

THE COURT: All right.

MR. KATZ: Just one thing, Your Honor. I thought I recall the Court indicating—giving an instruction on the fact that material may depict sexual intercourse, masturbation, sodomy, bestiality, oral copulation, et cetera—does not necessarily mean the material is obscene.

Now, I didn't hear the Court give it. I am not positive.

THE COURT: No, I would not give that instruction.

MR. KATZ: All right.

THE COURT: Is there anything else?

MR. KATZ: That was Defendants' 22.

THE COURT: Yes, I understand.

MR. KATZ: Now, just so it is clear, my clients [Vol. 30, 4980] join in the objections Mr. Fleishman has made and all the objections made at the previous conference are incorporated—

THE COURT: Correct.

MR. KATZ: —in these objections made.

THE COURT: All right. Mr. Butcher?

* * *

[Vol. 30, 4982] THE COURT: Ladies and Gentlemen of the Jury:

If during my instructions I referred to the advertisement as a "magazine", rather than an advertisement, please disregard that reference.

If it becomes necessary, Ladies and Gentlemen, during your deliberations to communicate with the Court, you may send a note by the Bailiff signed by your Foreman or by one or more members of the Jury. No member of the Jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the Jury on any subject touching on the merits of the case, other than in writing or orally here in open Court.

You will note from the oath about to be taken by the Bailiffs that they too as well as all other persons are forbidden to communicate in any way or in any manner with any member of the Jury on any subject touching on the merits of the case.

Bear in mind also that you are never to reveal to any person, not even to the Court, how the jury stands numerically or otherwise on the question of the guilt or innocence of the accused, until after you have reached a unanimous verdict.

All right. You may swear the Bailiffs, Mr. Clerk.

[Vol. 30, 4983] (Oath administered.)

THE COURT: All right. Ladies and Gentlemen of the Jury: At this time you will retire for your deliberations. You may begin your deliberations.

* * *

VOL. 31

[Vol. 31, 4989] THE COURT: Let the record show that all 12 jurors are present, the defendants are present with their respective counsel, and perhaps I ought to introduce you to Mr. Warren Reese, United States Attorney's Office, who I am sure you have met already, who is sitting in for Mr. Butcher; and Mr. Irwin Gostin, who is the partner of Mr. Katz, who is sitting in for Mr. Katz.

Mr. Allen, you have indicated a request, which is Court's Exhibit 9, and which reads as follows:

> "December 17, 1971. The jury requests that Judge's Instructions concerning the law on obscenity be re-read at the Court's earliest [Vol. 31, 4990] convenience. Monday morning preferred. Charles Allen, Foreman."

I wrote back:

"All right, Monday A.M." and then I initialed it.

Mr. Allen, is that your desire?

FOREMAN ALLEN: Yes, it is your Honor.

THE COURT: Now I am a little concerned about the scope of what you want me to read. I can begin with the violations of the statute, the alleged violation of the statute, and I take it what you are concerned about is the entire part of the instructions having to do with obscenity; is that correct?

FOREMAN ALLEN: Right. We have copies of the Indictments and we have no wish to have those re-read.

It was just your instructions on the three-pronged points of obscenity and of the pandering.

* * *

[Vol. 31, 5010] Now, does that answer your questions?

[Vol. 31, 5011] FOREMAN ALLEN: Yes, it does.

* * *

[Vol. 31, 5012] MR. FLEISHMAN: If the Court please, for the record I would like to repeat the objections we have previously stated with regard to the instructions on the law of obscenity, both in what the Court did instruct erroneously as we believe and failed to instruct as we had requested.

I particularly, however, would like to focus on the pandering instruction as it has come up in this case, your Honor. Given the law as I understand it, if pandering is to be given at all it is a matter of evidence. It is an evidentiary matter. That being so, it seems to me that your Honor should have, and I would request your Honor at this time to do so—that your Honor should have given the instruction on reasonable doubt and presumption of innocence, which also bears upon the question of whether something is obscene.

[Vol. 31, 5013] What your Honor has told the jury basically is that the test is, of course, whether the material is obscene or not, that pandering is of some value as of a matter of evidence, and I think that your Honor has given the Government's aspect of the evidentiary matter.

The evidentiary matter that seems to us to be of great moment at this moment is that there is a presumption of innocence and the reasonable doubt.

I think that those instructions at this time ought to be given to the jury to balance off the pandering instruction, your Honor, and I so request.

THE COURT: The request is denied.

* * *

VOL. 32

* * *

[Vol. 32, 5053] THE COURT: On which motion are you going to address yourself?

MR. FLEISHMAN: I will start first, Your Honor, on the Motion and Arrest of Judgment, * * *

[Vol. 32, 5074] Now, turning to the Judgment of Acquittal, Motion for Judgment of Acquittal, Your Honor, * * *

[Vol. 32, 5086] Your Honor, we have alternatively, of course, made Motions for New Trials. * * *
[Vol. 32, 5091] Mr. Katz.

MR. KATZ: Thank you, Your Honor. May it please the Court, Mr. Prosecutor, Mr. Fleishman. At the outset, Your Honor, I would like to adopt all of the arguments and the papers filed by Mr. Fleishman. They were filed on behalf of all Defendants, and I join in them. I think he has adequately covered the law very well. I also believe that the information contained in Mr. Fleishman's arguments are persuasive.

I would just like to talk briefly, Your Honor, about the three Defendants that I am representing and discuss some factors that I think the Court should consider in deciding the motions.

* * *

[Vol. 32, 5101] THE COURT: All right. No, I have no other inquiry.

Taking the motions in order, gentlemen, first of all let me say that it was with a great deal of effort and a great deal of concern that the Motion for Judgment of

Acquittal at the close of the Prosecution's case and again at the close of the entire case was denied. I had reviewed the evidence completely at the close of the Prosecution's case, because of the Motion for Judgment of Acquittal and again at the close of the entire case, before the case was submitted to the Jury, and have now again reviewed the factual matters in the case. I think that we have to look at what occurred here over the past thirty some odd days that we were in trial in the case.

First of all, it wasn't as though the Jury, as [Vol. 32, 5102] I perceived it, were uninformed of the entire law in the field of obscenity, as they had before it—before them throughout the trial, a publication which had a section devoted primarily, if not exclusively, to the law and the case law in the field.

They perceived the witnesses, each with lengthy cross-examination, some with lengthy direct examination, even to the point of lengthy qualification examination. It seems to me that they deliberated, if my memory serves me correctly, something in excess of four to five days, maybe longer, and I think that one would have to say that the Jury was astute in their verdict.

I think the Jury perceived the law as stated by the Court, and the Court diligently, I can assure you, worked on the instructions that were given, because there are areas of the law here that have been in a state of change, there is no question about that. The entire field is in a state of change. The Supreme Court

has set down certain guidelines and based upon those guidelines, the Court instructed the Jury accordingly.

I felt at that time—that is, at the close of the Prosecution's case—that there was sufficient to go to the Jury, sufficient evidence to go to the Jury as to all Defendants. I felt at the close of the [Vol. 32, 5103] entire case there was sufficient evidence to go to the Jury as to all Defendants. And I feel now that there was sufficient evidence as to all Defendants to go to the Jury.

According to one Ninth Circuit Case—it is the case of *Sabban versus People of the Territory of Guam, 434 Fed. 2nd. 837*, the Ninth Circuit has indicated that all that is required on the Jury is that it weigh all of the evidence, direct and circumstantial, against the standard of reasonable doubt. The proper test is not whether the evidence excludes every hypothesis except that of guilt, but rather whether the jurors could reasonably arrive at their conclusions.

It seems to me that the fact that the Jury was unable to arrive at a conclusion relative to the publication of the book and even to the extent that they did not acquit Greenleaf Classics relative to the publication of the book—they simply did not decide it or could not decide it—and that after some five plus days, they concluded that the brochure was, in fact, obscene; was, in fact, mailed by these Defendants, as they convicted them all of all counts relative to the brochure; convicted none of any counts relating to either the book itself or the brochure, insofar as those counts that dealt with where and how [Vol. 32, 5104] the

book could be obtained. There was no verdict reached in that regard. The verdict is not, in my opinion, was not then and is not now, the least bit inconsistent.

It seems to me that the Government put on sufficient evidence for that which the Jury—of that which the Jury convicted the Defendants, and that is of the conspiracy charge, which one would have to assume related to the brochure as the conspiracy charge did, used the words both "obscene advertisements and obscene books." So, the verdict is consistent insofar as it goes and insofar as the Jury could make the determination that they did.

I think that if we analyzed the verdicts, they have found and could find each of the Defendants guilty, except that of Greenleaf Classics of the conspiracy and of each count setting forth the mailing of the brochure.

As I recall, the Jury was instructed more than one time on more than one aspect of this case and I think the most recent instruction, prior to the verdict being rendered, was that of the—if my memory serves me correctly—was that of the aspect of redeeming social value test, that portion of the test of obscenity.

I cannot say and I do not say that there is insufficient evidence to convict these Defendants of [Vol. 32, 5105] the charges that they were convicted of by twelve reasonable and I might add, what I thought were astute people. I do not choose to upset that verdict, as I believe in the verdict.

I believe that it was a correct verdict under all of the circumstances and I believe that the Jury diligently

labored in order to obtain the verdict that they did. I think one would have to see the Jury as I saw it and as you saw it, all of you, for the period of time that you did, to see how diligently and how much effort they put into the case. It wasn't a matter of being decided in a matter of hours or even a matter of days, it was a matter of several days. There was a great deal of evidence and a great deal of exhibits.

So, insofar as the Motion in Arrest of Judgment is concerned, then, as it pertains to the Indictment and so forth, I have already ruled on that prior and I would rule the same way again that that motion is denied.

Insofar as the Motion for a New Trial is concerned, I find nothing in the trial that would lead me to grant such a motion, and, in fact, to the contrary, having the feelings that I do, that the Jury verdict was proper in all respects. I would deny that motion.

With regard to the Motion for Judgment of [Vol. 32, 5106] Acquittal, this motion, as I said before, was passed upon by me on two prior occasions. I have re-reviewed the test as set forth in Wright and the test as I read, as set forth in the Ninth Circuit, again would deny that motion.

* * *

OPINION AND JUDGMENT OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT

The opinion and judgment of the Court of Appeals for the Ninth Circuit appears in Appendix A to the petition for a writ of certiorari, filed on September 18, 1973, and granted on January 14, 1974 (October Term 1973, No. 73-507).

ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING

The order of the Court of Appeals denying petition for rehearing appears in Appendix C to the petition for a writ of certiorari, filed on September 18, 1973, and granted on January 14, 1974 (October Term 1973, No. 73-507).

Supreme Court of the United States

No. 73-507

William L. Hamling, et al.,

Petitioners,

v.

United States

ORDER ALLOWING CERTIORARI. Filed January 14 ----------, 19 74.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ----------Circuit is granted. The case is set for oral argument in tandem with No. 73-557.

FILED
SEP 18 1973
MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-507

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1973

No. .....

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioners, William L. Hamling, Earl Kemp, Shirley R. Wright, Reed Enterprises, Inc., David L. Thomas and Library Service, Inc., respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on June 7, 1973.

Opinion Below.

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 7, 1973. A due and timely petition for rehearing and suggestion for rehearing en banc was filed on or about June 18, 1973. On

August 22, 1973, an order was entered stating that the aforesaid petition "will be submitted to the full court".[1] A copy of the said order appears in Appendix B hereto. On August 23, 1973, an order was entered denying the petition for rehearing and rejecting the suggestion for a rehearing en banc. A copy of the said order appears as Appendix C hereto. On August 28, 1973, the Honorable Stanley N. Barnes, a Judge of the United States Court of Appeals for the Ninth Circuit, made an order staying issuance of the mandate of the court pending the filing, consideration and disposition by this Court of a Petition for a Writ of Certiorari on or before September 24, 1973. A copy of the said order appears as Appendix D.

Questions Presented.

1. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, are vague, ambiguous, uncertain, overbroad, unworkable and incapable of objective measurement contrary to the free speech and press, due process, equal protection and fair trial provisions of the First, Fifth and Sixth Amendments, and the interpretive decisions of this Court in *Miller v. California*, 93 S.Ct.2607; *Paris Adult Theatre I v. Slaton*, 93 S.Ct.2628; *United States v. Orito*, 93 S.Ct.2674; *United States v. 12 200-Ft. Reels of Film*, 93 S.Ct. 2665; and *Kaplan v. California*, 93 S.Ct.2680.

2. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as

[1]An order was initially entered on July 9, 1973 denying the petition for rehearing, but was thereafter, by order of the court, withdrawn on July 19, 1973.

construed and applied to authorize the judgments of conviction herein, where the case presented to the grand jury, the trial of the case and the submission of the case to the jury, were all conducted under constitutionally impermissible, unrealistic, abstract, hypothetical and unascertainable standards for judging obscenity, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments, and the interpretive decisions of this Court.

3. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the indictment, and each and every count thereof, failed to state the essential elements of the offense, or to apprise the petitioners of the nature and cause of the accusations made against them, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments, and the interpretive decisions of this Court.

4. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, under a standard for judging scienter solely by alleged proof of knowledge of the "contents"

of the brochure involved, the courts below having rejected any requirement of proof of knowledge of the alleged obscenity of the brochure or proof of reckless disregard of the alleged obscenity, or intent to commit a public wrong, and specifically rejecting a defense of honest ignorance of the alleged obscenity of the brochure, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute an infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

5. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, without any evidence to establish that each of the petitioners even possessed knowledge of the alleged contents of the brochure, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

6. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, upon a record establishing both in law and fact that the brochure herein involved is not obscene and is entitled to constitutional protection, abridge the exercise of freedoms of speech and press,

arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

7. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, without proof of the essential elements of obscenity and scienter, or proof of corrupt agreement or aiding and abetting or causation by petitioners, under both the conspiracy and substantive counts of the indictment, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

8. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where petitioners were prejudicially denied the opportunity to make objections to the trial court's instructions out of the presence of the jury, in violation of the specific requirements of Rule 30 of the Federal Rules of Criminal Procedure, arbitrarily deprive petitioners of their liberty and property without due process of law and deny petitioners the right to a fair trial in violation of the due process and fair trial provisions of the Fifth and Sixth Amendments, and the said Rule 30 of the said Federal Rules of Criminal Procedure prescribed by Congress and this Court.

9. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the jury, under the instructions of the trial court, was permitted to convict petitioners of allegedly "pandering" the brochure here involved, without statutory authority or charge in the indictment, or any evidence in the record to establish such "pandering", abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

10. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the jury, under the instructions of the trial court, was permitted to find that the brochure appealed to the prurient interest of undefined sexually deviant groups, without charge in the indictment or any evidence in the record to establish that the brochure was designed for or primarily distributed to sexually deviant groups, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punish-

ment in violation of the First, Fifth, Sixth and Eighth Amendments.

11. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the trial court excluded an entire category of constitutionally relevant evidence offered by petitioners on the issues of nonobscenity of the brochure and lack of guilty knowledge, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

12. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the indictment was returned by a grand jury which was presented with no evidence of the essential elements of the offense charged, which was misdirected by the prosecutor as to the applicable law, and where the prosecutor appealed to the biases and prejudices of the members of the grand jury, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punish-

ment in violation of the First, Fifth, Sixth and Eighth Amendments.

13. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the system for the selection of the jury panel from which the jury was drawn systematically excluded persons under 25 years of age, the trial court refusing to grant a short continuance to enable the jury to be representative of a cross-section of the community, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

14. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the trial court declined to ask prospective jurors on *voir dire* questions proposed by petitioners with respect to the jurors' biases and prejudices concerning sex and obscenity, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fifth, Sixth and Eighth Amendments; Title 18 United States Code §§2, 371 and 1461; and Rule 30 of the Federal Rules of Criminal Procedure appear in Appendix E hereto.

Statement.

1. The indictment was returned on March 5, 1971. The conduct involved with respect to the brochure occurred on specified dates in 1969 and 1970. The judgments of conviction were entered in the District Court on February 7, 1972. The opinion affirming the judgments of conviction was rendered on June 7, 1973. The indictment, the trial thereunder and the judgments of conviction rest therefore upon vague, ambiguous, uncertain, hypothetical, abstract, unascertainable, and unworkable statutory provisions and standards which existed prior to the rulings of this Court on June 21, 1973 in *Miller v. California*, 93 S.Ct.2607; *Paris Adult Theatre I v. Slaton*, 93 S.Ct.2628; *United States v. Orito*, 93 S.Ct.2674; *United States v. 12 200-Ft. Reels of Films*, 93 S.Ct.2665; and *Kaplan v. California*, 93 S.Ct.2680.

2. The indictment [C.T. 1-24][2] charged the individual and corporate petitioners with violations of 18 U.S.C. §§ 2 and 1461, and a conspiracy to violate the said statutes, contrary to the provisions of 18 U.S.C. § 371. Although the indictment was in twenty-

[2]The reference "C.T." is to the Clerk's Transcript on Appeal to the Court of Appeals for the Ninth Circuit.

one counts, the materials involved were only two in number. One item was a book entitled *The Illustrated Presidential Report of the Commission on Obscenity and Pornography* (hereinafter referred to as "*The Illustrated Report*"). The other item was a brochure which advertised the said book. Essentially, the indictment charged that the book was "obscene, lewd, lascivious, indecent, filthy and vile"; that the brochure similarly violated the federal obscenity statute; and, in addition, that the brochure gave information where, how, from whom and by what means the aforesaid book might be obtained, in violation of the said obscenity statute. The jury was unable to reach agreement on the charge made against *The Illustrated Report* or on the charge made against the brochure that it gave information how the book might be obtained. The petitioners were convicted therefore solely of mailing the brochure and conspiring to mail the brochure.[3]

3. Petitioners filed a series of pre-trial motions. There was a motion to dismiss the indictment upon the grounds, among others, that the indictment failed to state facts sufficient to constitute an offense against the United States, and that the federal obscenity statute, on its face and as construed and applied, violated the free speech and press, due process and equal protection provisions of the First, Fifth and Sixth Amend-

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[3]The publisher of the book *The Illustrated Report* was Greenleaf Classics, Inc., named as a defendant in the indictment. The jury returned a verdict of not guilty as to this defendant with respect to the conspiracy charge, as well as the mailing of the alleged obscene brochure. The petitioner Kemp was the Editor of *The Illustrated Report*, upon whose alleged obscenity the jury could not agree, but the record is devoid of any evidence to indicate that said petitioner was in any way connected with the preparation, printing or mailing of the brochure from the Central District of California (North Hollywood). The issue is discussed hereafter.

ments, and the cruel and unusual punishment provisions of the Eighth Amendment [C.T. 29-31].

It was urged that neither the statute nor the indictment defined the words "obscene, lewd, lascivious, indecent and filthy", and that this court had not yet given those terms "a settled meaning" [C.T. 93].

There was a motion for a bill of particulars which requested the Government to state "the essential elements" of the term "obscene" [C.T. 33]. The Government responded asserting that it would assume for purposes of argument "that the three-fold test, as enumerated in the plurality opinion in *Memoirs v. Massachusetts*, 383 U.S.413, 418 (1966), is the appropriate standard" [C.T. 174].

In connection with a separate motion to dismiss the indictment because of matters occurring before the grand jury, a pre-trial evidentiary hearing elicited testimony from the prosecutor who presented the case against petitioners to the grand jury [R.T. 13-14],[4] that he had advised the grand jury to be "guided solely by their instinctive feeling . . ." [R.T. 19-20]; that they were to be guided by the standards of "moral judgment" which they had "assimilated through the totality of their experiences" [R.T. 20-21]; that they were "the sole judges of the contemporary community standards of this country"; and that the term "contemporary community standards" refers to "the average conscience of the time" [R.T. 33; C.T. 814]. In addition, the prosecutor detailed to the grand jury the factual situation in *Ginzburg v. United States*, 383 U.S.463 (1966), placing particular emphasis on a pub-

[4]The reference "R.T." is to the Reporter's Transcript of Proceedings.

lication involved in *Ginzburg*; discussed the extent of the sales of the book involved in the *Ginzburg* case and the advertisement involved in that case; "drew a parallel" between the *Ginzburg* case and the case at bar; and advised the grand jury "that we felt that the facts in this case were similar enough to those in the *Ginzburg* case to present [the matter to the grand jury] to see if they felt there was probable cause to believe that a *Ginzburg*-type situation was present in [the case at bar]" [R.T. 28-29]. The prosecutor also testified that he presented no evidence on community standards, prurient interest or social value to the grand jury [R.T. 14, 21].

There was a motion to strike the jury venire and a challenge to the jury panel upon the ground, among others, of a systematic exclusion of an identifiable group within the community, to wit, persons 25 years of age and under [C.T. 683-696]. The hearing before the trial court on this issue established that the master wheel from which the trial jury was drawn was filled in 1968 with the names of registered voters at that time. In 1971 therefore, the venire from which the trial panel was drawn contained no person under 21 and, as a matter of fact, no person from 21-23 years of age, and very few, if any, under 25 years of age [R.T. 73-74]. Evidence offered by petitioners established that young persons were a cognizable group and more tolerant than older persons in matters relating to explicit sexual materials [R.T. 85-86]. The trial judge denied the motion to strike the jury panel, while conceding that the petitioners would have benefited by having jurors on the panel in the age group 18-25 [R.T. 91-92]. The Clerk of the court, having testified that the master wheel was going to be refilled

in about one month, the petitioners requested a short continuance to permit the selection of a more representative jury but the motion was denied [R.T. 94-98].

The entire *voir dire* examination was conducted by the trial court [R.T. 99, 137-164, 166-314]. The court declined to ask many of the questions proposed by petitioners [C.T. 827-851]. Among the questions petitioners unsuccessfully urged the court to ask the prospective jurors were the frequency with which they attended a place of worship and whether they considered themselves deeply religious; whether they recently had heard a sermon at their place of worship dealing with the subject of obscenity; whether they had ever been a member of or made contributions to the Citizens of Decent Literature, or any other organization having as one of its purposes the control by law of obscene material; whether they had recently seen a film or read a book dealing candidly with sexual matters; whether they would refrain from viewing a film solely because it was condemned by a publication known as the "Catholic Newsletter"; and the age of each prospective juror [C.T. 832-852; R.T. 126-137].

4. The charge in the indictment was that the book, "The Illustrated Report", was mailed from the Southern District of California (San Diego), where the place of business was located. On the other hand, the indictment charged that the advertisement, the brochure, was mailed from the Central District of California (North Hollywood) and that petitioners either aided or abetted said mailing or conspired to mail the said brochure. In this respect, the evidence adduced by the prosecution was as follows.

Richard Harte and his wife, Venita Harte, doing business as Academy Addressing and Mailing Service

[R.T. 666],[5] were engaged in the business of performing a service for persons who wished to have commercial mailings. Their service consisted of the insertion of letters, brochures, and the like, into envelopes [R.T. 666]. Some time in January, 1971, Mr. Harte received a telephone call from a man named Bernard Lieberman on behalf of Regent House, located in North Hollywood, California [R.T. 667]. Mr. Harte learned later that Mr. Lieberman was a warehouseman for Regent House.[6] The sole service rendered by the Hartes was the insertion of the brochures and a return envelope into an outside envelope and the sealing thereof [R.T. 697]. The Hartes affixed postage to the envelopes through the use of a meter head owned and furnished by Regent House [R.T. 698-699]. Mr. Harte knew nothing about the corporate petitioners Library Services, Inc., and Reed Enterprises, Inc., or the corporate defendant Greenleaf Classics, Inc. [R.T. 761], and he had never had any dealings with nor did he know the petitioners Earl Kemp, Shirley Wright, David Thomas or William Hamling [R.T. 701, 708-709].

It should also be noted at this point that no officer or employee of Regent House, nor the aforesaid Bernard Lieberman, ever appeared at the trial to offer any testimony.

There is no evidence in the record of any kind as to who was responsible for the preparation of the contents of the advertisement.

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[5]The Hartes were named as unindicted co-conspirators in the indictment [C.T. 2].

[6]Bernard Lieberman, doing business as Regent House, North Hollywood, California, was named in the indictment as an unindicted co-conspirator [C.T. 2].

Mrs. Harte, who worked with her husband, was responsible for the billing, and she billed Regent House for the services furnished by Academy Addressing and Mailing in the sum of $541.15 [Gov. Ex. 25; R.T. 714]. The Hartes did not personally mail the envelopes. They presumably were picked up by Regent House [R.T. 715]. All that Academy did was to send a bill to Regent House and get a check back [R.T. 721]. No name of any individual petitioner appeared on the envelopes or on the advertisements.

The government offered into evidence [Gov. Ex. 29-A; R.T. 770] a photocopy of a check drawn on the Regent House account in the amount of $3,300.00 to the United States Postmaster. According to the government, Regent House billed Reed Enterprises, Inc., in the form of what was described at the trial as an adding machine tape [Gov. Ex. 47; R.T. 829], for a total sum of $4,102.27, which allegedly covered the amount billed by Academy, postage costs, and a few other minor items. Thereafter, on January 19, 1971, a check from Reed Enterprises to Regent House in the sum of $4,102.27 was introduced into evidence bearing the signature of petitioner William Hamling [Gov. Ex. 48; R.T. 830]. The government also introduced an invoice from London Press, Inc.,[1] of North Hollywood, California, to Reed Enterprises, Inc., in the amount of $3,817.80 [Gov. Ex. 54; R.T. 827], which allegedly constituted a charge for the printing of the brochures, and a check in the sum of $4,843.14 [Gov. Ex. 56; R.T. 828], which allegedly included payment for the aforesaid bill and some

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[1]London Press, Inc., was also named in the indictment as an unindicted co-conspirator [C.T. 2].

other item, was thereafter made out to London Press, Inc., bearing the signature of petitioner Hamling.

No officer, employee, or other person on behalf of London Press, Inc., ever testified at the trial.

On the issue of "obscenity", the government called only two witnesses in support of its contention that the brochure was in fact obscene. The government called Dr. Melvin Anchell, a medical doctor and a self-proclaimed psychiatrist without Board certification [R.T. 1606, 1609, 1629-1631]. His testimony concerning the brochure consisted of one word. When asked his opinion as to the dominant theme of the brochure, he answered, "Prurience" [R.T. 1711]. The trial court recognized that Dr. Anchell was "rigid" [R.T. 2174].

The government's other expert witness was a Mr. Frank Getlein, a newspaper man. He testified that in his opinion the brochure was patently offensive [R.T. 2373] and was utterly without redeeming social value [R.T. 2372].

Petitioners called four expert witnesses, each of whom testified that the brochure had redeeming social value: Dr. Otto N. Larsen, one of the Commissioners of the Commission on Obscenity and Pornography; Dr. W. Cody Wilson, the Executive Director and Director of Research of the Commission; Dr. Jack Haberstroh, Assistant Professor of Journalism at the San Diego State College; and Professor Dwight V. Swain, a Professor of Journalism and Literature.

Commissioner Larsen and Dr. Wilson also testified that the brochure did not appeal to "prurient interest" and that it did not go beyond "customary limits of candor" in sexual matters and was not patently offen-

sive [R.T. 4246-4247, 3546-3548, 3683-3685, 3688, 3740].

The government did not put on any rebuttal evidence.

It should be observed that the brochure advertised the book, "The Illustrated Presidential Report of the Commission on Obscenity and Pornography", and that a considerable portion of the evidence offered by both the government and petitioners revolved about the question of the alleged obscenity or nonobscenity of the book, an issue upon which the jury could not agree. It was stipulated by the government during the trial, however, that every picture in "The Illustrated Report" was related to the text of the Commission Report [R.T. 3359]; that pictures similar to those appearing in the book were used in various research activities that the Commission undertook [R.T. 3360]; that the photographs and other illustrations in "The Illustrated Report" depicted explicit sexual material within the definition of that term as it was used by the Commission in its Report [R.T. 3516]; and that every picture in "The Illustrated Report" was similar to some of the material used by some of the researchers in the Commission Report [R.T. 3520, 4252]. Each of the depictions contained in the brochure advertising "The Illustrated Report" appears in the said book, and the statement in the brochure with respect to the probability that the scenes depicted in the brochure were part of the photographs used in one of the studies for the Commission (Katzman Studies) appears to be accurate, in the light of the stipulations by the government during the trial.

5. The petitioners, on their own behalf on the fundamental issues of obscenity and *scienter*, offered

documentary evidence as well as oral testimony by expert witnesses. The categories of documentary evidence which the petitioners proposed to introduce included, first, comparable publications which had received second-class mailing privileges; second, comparable publications which had been adjudicated by the courts to be constitutionally protected; third, comparable material openly available on the newsstands with confirming testimony that such material had received a reasonable degree of acceptance, both in the local community (San Diego) and in the nation as a whole; and fourth, material used by the commission. The trial court held that the law permitted proof by an accused of community standards "either by comparables, by the introduction of comparables or by the introduction of expert witnesses". The court ruled that "comparables will not be permitted for this reason: primarily they tend to confuse the jury. They tend to set up matters that I feel would serve no probative value in comparison to the amount of confusion and deluge of material that could result therefrom". The trial court therefore concluded that petitioners could produce expert witnesses, "but you are not permitted to use comparables in any manner before this jury" [R.T. 3151-3153].

In the light of the trial court's rulings, an entire category of evidence offered by the petitioners which bore importantly on the issue of contemporary community standards, prurient interest, and social importance, as well as issues of guilty knowledge and intent, were excluded from consideration by the jury. The jury was permitted to conclude that the brochure herein involved exceeds the limits of candor set by contemporary community standards without being permit-

ted to receive evidence as to the kinds of comparable explicit sexual material that both the local community and the national community generally tolerate.[8]

6. Virtually all of petitioners' requests for instructions with respect to the issue of *scienter* on the part of the individual petitioners were rejected. The trial court declined to instruct the jury that the government was required to prove beyond a reasonable doubt that each of the petitioners in some manner was aware that the brochure was utterly without social value, exceeded contemporary community standards, and appealed to a prurient interest [C.T. 760]. The petitioners requested an instruction that proof that petitioners merely knew the contents of the material did not satisfy the *scienter* requirement [C.T. 761]. The trial court refused to instruct the jury that if any petitioner was honestly ignorant of the alleged obscenity of the brochure, then the accused should be found not guilty [C.T. 768]. Petitioners requested the court to instruct the jury that to establish a specific intent, the government must prove beyond a reasonable doubt that petitioners knowingly did an act which the law forbids, purposely intending to violate the law. The request was denied [C.T. 774]. Indeed, the court stated that the only specific intent instruction the court would give would be with respect to the issue of conspiracy, and then only "as it relates to the specific intent to do the act, to wit, placing the matter in the mail with knowledge of the contents" of the material [R.T. 4454]. In refusing to give the instruction with respect to "purposely intending to violate the law", as requested by

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[8]Attached hereto as Appendix F is a resume of the foundation testimony and a summary of the comparable documentary evidence which was excluded by the trial court.

petitioners, the trial court stated: "They can't know that they are violating the law. That has yet to be determined." [R.T. 4456]. The court stated that it would give an instruction that petitioners' belief as to the nonobscenity of the book and brochure was immaterial [R.T. 4479].

The court therefore instructed the jury that the requirement of "knowledge" applies both to placing the material in the mails or in interstate commerce and to petitioners' "knowledge as to the contents of the envelopes and packages, and that is the intent required" [R.T. 4942]. The court stated that the government must prove beyond a reasonable doubt that petitioners knew the envelopes containing the subject materials were mailed and that they had "knowledge of the character of the materials" [R.T. 4942]. The court stated that the jury must be satisfied beyond a reasonable doubt that the petitioners "were aware of the character and the nature of the materials alleged to have been mailed" [R.T. 4943]. "The defendants' belief as to the obscenity or non-obscenity of the material is irrelevant" [R.T. 4943]. On the issue of willfully depositing or causing to be deposited for delivery the specific material involved, the court stated that an act is willfully done if it is done intentionally and with the specific intent to do something the law forbids "or in this case, with the specific intent or knowledge of the contents of the package" [R.T. 4943-4944].

Despite the absence of any charge in the indictment or any proof in the record of alleged "pandering", the trial court nevertheless instructed the jury that even if the brochure did not meet the tripartite *Memoirs* test, still the jury was free to find the bro-

chure obscene if the jury found that the brochure was "produced and sold as stock in trade of the business of pandering" [R.T. 4954]. The "pandering" instructions by the trial court to the jury were extensive [R.T. 4953-4954]. It is important to note that after the jury had begun its deliberations, it requested the court to reread its instructions on obscenity and "pandering" [R.T. 4989-4990].

The trial court instructed the jury: "Prurient interest is a shameful or morbid interest in sex or nudity and you must measure this appeal by the average or ordinary adult or by a clearly defined deviant group as will be explained elsewhere" [R.T. 4946]. The trial court then addressed itself to the two aforesaid alternatives. The court first instructed the jury that the brochure could be measured by its appeal to the average adult and not by young persons or persons highly susceptible thereto [R.T. 4946-4947]. The court also instructed the jury that if some of the material appealed to the prurient interest of the average person and some of the material appealed to the prurient interest of a deviant sexual group, still the jury would not be precluded from finding that the dominant theme of the material, taken as a whole, appealed to the prurient interest [R.T. 4948]. The trial court, on the other hand, instructed the jury that "in addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of sexual interest of the intended or probable recipient group" [R.T. 4947].

There was never any charge in the indictment nor any proof in the record that the brochure herein was designed for or primarily disseminated to a clearly defined sexually deviant group rather than the public at

large. Further elucidation of this issue appears in Reasons for Granting the Writ.

To all of the aforesaid denials of petitioners' requested instructions, and to the trial court's instructions, there were appropriate objections made by the petitioners.

7. Rule 30 of the Federal Rules of Criminal Procedure provides that a party may not assign as error any portion of the charge to the jury unless he objects before the jury retires to consider its verdict. The Rule specifically provides that opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

After the court instructed the jury, counsel for petitioners stated a desire to object to portions of the charge and specifically urged the trial court to ask the jury to go into the jury room while petitioners' objections were presented. The trial court denied the request [R.T. 4970]. Thereafter, counsel was compelled to make objections to the trial court's instructions in the presence of the jury. The objections were wide-ranging and covered a multitude of areas in which counsel for petitioners claimed erroneous instructions had been given. All of these objections counsel was compelled to make in the presence of the jury [R.T. 4978-4981].

8. There were appropriate motions made by petitioners for judgments of acquittal at the end of the government's case and at the end of the entire case, and there were also post-trial motions in arrest of judgment, for a new trial, and for acquittal. All of the said motions were denied.

As heretofore stated, the jury could not agree on a verdict with respect to "The Illustrated Report". The jury reached a verdict of guilty only with respect to the alleged obscenity of the brochure, both on the conspiracy and substantive counts. Judgments of conviction were entered on February 8, 1972. The petitioner Hamling was sentenced to imprisonment for four years and fined $32,000.00; petitioner Kemp was sentenced to imprisonment for three years and one day; petitioner Wright was sentenced to imprisonment for one and one-half years, execution of the sentence suspended, and petitioner placed on probation for a period of five years; and petitioner Thomas sentenced to imprisonment for one and one-half years, execution of the sentence suspended, and petitioner placed on probation for a period of five years. The conditions of probation were extremely onerous. A fine of $43,000.00 was imposed on petitioner Reed Enterprises, Inc., and a fine of $12,000.00 was imposed on petitioner Library Service, Inc. Bail for petitioner Hamling was fixed in the sum of $15,000.00; for petitioner Kemp, in the sum of $10,000.00; and for each of the petitioners Wright and Thomas, in the sum of $1,000.00. The said bail was furnished and petitioners were freed on bail pending appeal.

9. As appears from the opinion of the Court of Appeals, the judgments of conviction were affirmed. The court held that 18 U.S.C. § 1461 was not unconstitutionally vague and that the use of the statutory language in the indictment did not fail to advise petitioners of the charge which they were called upon to defend. The court held that the indictment herein, framed in the language of the statute, was not indefinite or vague. In the court's view, the word "knowing-

ly", as set forth in the indictment, sufficiently charged "knowledge of all the essential facts as relates to the charge against the defendants" (App. A, p. 8). Other aspects of the opinion of the Court of Appeals are discussed in Reasons for Granting the Writ which follows hereafter.

REASONS FOR GRANTING THE WRIT.

A.

1. The trial court gave to the jury the tripartite *Memoirs* instructions [R.T. 4945-4953]. The jury was instructed that the three elements must coalesce, to wit, that the dominant theme of the material, taken as a whole, appeals to the prurient interest of the average person; that the material is patently offensive only if it goes substantially beyond "contemporary national community standards" relating to the description or representation of sexual matters; and that the material is "utterly without redeeming social value" [R.T. 4945].

In delineating these three elements, the trial court emphasized that in determining whether the material is patently offensive the jury must find that the material goes substantially beyond what is reasonably accepted according to the "contemporary standards of the community as a whole, the national community as a whole" [R.T. 4948-4949]. It was stated that the material must be measured by "current national community standards", and that the material was required to exceed the customary limits of candor "which are reasonably acceptable in the national community". The trial court instructed: "Contemporary community standards means the standards generally held throughout this country concerning sex and matters pertaining to

sex" [R.T. 4949]. The court added: "You are the sole judges of the contemporary community standards of this country . . . You are not to limit yourself to what you have learned while residing in your present locality or what you have learned or observed from and about people residing in your present locality." [R.T. 4949-4950]. Only if the material substantially exceeds the limits of candor in the descriptions or representations of sex "which are acceptable in the national community" could the jury find the material to be patently offensive. The evidence must show beyond a reasonable doubt that the advertisement exceeds "customary limits of candor in the nation as a whole" in the description and representation of sex and nudity [R.T. 4940]. The jury was admonished that the "contemporary community standards of the nation" are set by what is reasonably accepted "by the national community as a whole. That is to say, by society at large or people in general throughout the nation", and that "the national community as a whole may, from time to time, find acceptable that which was formerly unacceptable" [R.T. 4950-4951].

With respect to the issue of "social value", the trial court instructed the jury as follows: "It is for you to determine whether the materials at issue in this case are of value to society. Only if you find that they are utterly without redeeming social value—social importance—can you brand them obscene." [R.T. 4952].

The trial court concluded this aspect of the instructions by stating as follows: "The court has instructed you that material may not be condemned as obscene unless it substantially exceeds contemporary national community standards, appeals to prurient interest, and is utterly without redeeming social value." [R.T. 4953].

On June 21, 1973, in *Miller v. California* and related cases, this Court enunciated new and prospective standards for judging obscenity. This Court emphasized that "no one will be subject to prosecution for the sale or exposure of obscene materials" unless the materials offended the new standards promulgated by the Court. Only if "these specific prerequisites" were provided by statute or construction would the due process provisions of fair notice required under the Constitution be satisified. *Miller v. California*, 93 S.Ct. at 2616-2617.

Both the majority and dissenting Justices unanimously agreed that the prior standards for judging obscenity were unworkable, incapable of objective measurement, and clearly vague, uncertain, ambiguous and overbroad. "The case we now review was tried on the theory that the California Penal Code § 311 approximately incorporates the three-stage *Memoirs* test, *supra.* But now the *Memoirs* test has been abandoned as unworkable by its author [Mr. Justice Brennan in his dissent], and no member of the Court today supports the *Memoirs* formulation." (93 S.Ct. at 2614). It was further stated: "We do not adopt as a constitutional standard the '*utterly* without redeeming social value' test of *Memoirs v. Massachusetts, supra,* 383 U.S. at 419 (1966); that concept has never commanded adherence of more than three Justices at one time." (93 S.C. at 2615). Moreover, stated this Court: "We also reject as a constitutional standard the ambiguous concept of 'social importance' " (93 S.Ct. at 2615, n.7).

In addition, this Court rejected the notion of testing the alleged obscenity of material by "national community standards". This Court stated that "uniform national standards" of what appeals to prurient interest or is patently offensive cannot be fixed. It was held

that a single formulation could not be made for the nation and that it would be unrealistic to require determinations by the fact-finder based on some "abstract formulation". The Court noted: "To require a State to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility." The Court concluded: "Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' without attempting to determine whether certain materials are obscene as a matter of fact." (93 S.Ct. at 2619).[9]

2. The conclusion is evident from this Court's opinions in *Miller v. California* and related decisions that a prior trial under the federal obscenity statute, conducted, as this case was, under the standards for judging obscenity promulgated in *Memoirs*, resulted in a judgment of conviction which is constitutionally impermissible. The jury in the case herein was required to measure the alleged obscenity of the brochure by "national community standards", a national standard which this Court has termed "hypothetical", "unascertainable", "abstract", "unrealistic" and "an exercise in futility". With respect to the element of social value and importance, this Court unanimously agreed that

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[9]Congress appears to have intended the use of a national standard in the enforcement of 18 U.S.C. § 1461, and members of this Court in the past have indicated that there are greater dangers of crippling censorship in federal obscenity prosecutions than in state prosecutions. See, *Miller v. California*, 93 S.Ct. 2607, 2619-2620; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488, n.10. See also, the pertinent testimony of Justice Rehnquist, then Assistant Attorney General, Office of Legal Counsel, Department of Justice, testifying at hearings before a subcommittee of the Committee on the Judiciary of the House of Representatives on September 25, 1969, a portion of which testimony appears as Appendix G hereto.

the concept of social value and importance is constitutionally ambiguous and "unworkable" and, indeed, virtually without "any meaning at all" (93 S.Ct. at 2613). The jury in the last analysis was permitted under the federal obscenity statute, as construed and applied by the trial court, to exercise their individual whims and prejudices as to what was deemed "socially desirable", and this constitutes an abandonment of the rule of law, rather than its exercise. See, *Papachristou v. Jacksonville*, 405 U.S.156, 168-169.

The trial was therefore conducted under standards which this Court has held to be vague, ambiguous, uncertain and overbroad. Moreover, the statute, 18 United States Code § 1461, is not on its face limited to any specifically defined sexual conduct. The trial court's instructions to the jury defining "obscenity" were restricted to the three-part *Memoirs* test. Thus, neither the statute on its face, nor as construed and applied by the court's instructions, was confined to specifically defined depictions or representations of sexual conduct. Neither the lower federal courts nor this Court has ever had occasion to authoritatively construe the federal obscenity statute to limit its reach to specifically defined sexual conduct. See, *United States v. 12 200-Ft. Reels*, 93 S.Ct. at 2670, n.7. Clearly, even if an authoritative construction should come in the future from this Court, it was no part of the statute as alleged in the present indictment or the trial court's instructions to the jury. See, *Rabe v. Washington*, 304 U.S.313; *Bouie v. Columbia*, 378 U.S.347.

In three respects, therefore, 18 U.S.C. § 1461, on its face and as construed and applied by the indictment and the trial court's instructions, is unconstitutional in the light of the newly promulgated standards for

judging alleged obscenity: first, the statute is not limited to specifically defined depictions or descriptions of sexual conduct; second, the statute contains the vague and ambiguous standard "utterly lacking in redeeming social value or importance"; and third, the statute contains the "unascertainable" requirement that the material be judged by "national community standards".

3. Plainly, the new standards cannot be applied retroactively to the case herein. To apply standards which are now to be measured by lack of serious literary, artistic, political or scientific value when taken as a whole, together with all other applicable standards, would raise serious constitutional questions of due process, *ex post facto* legislation and arbitrary, retroactive, judicial construction. See, *Bouie v. Columbia*, 378 U.S.347. In addition, such retroactive construction would amount to a wholesale amendment to the indictment returned against the petitioners, contrary to fundamental constitutional principles and the interpretive decisions of the Supreme Court. See, *Ex parte Bain*, 121 U.S.1.

The court below appears to have denied the petition for rehearing upon the ground that the trial of the case herein was conducted under "more relaxed standards" (App. B, p. 39) than those announced by this Court prior to the decisions of June 21, 1973. With due deference, the concept that the quintet of decisions rendered by this Court on June 21, 1973, did no more than ease prosecutorial burdens in obscenity prosecutions, and that petitioners may not complain of a conviction under the *Memoirs* standards for judging obscenity, appears contrary to law and the constitutional principles enunciated by this Court in *Miller* and the related decisions. The opinions of this Court on June

21, 1973, clearly indicated that all parties, prosecution and defense alike, and indeed the community at large, suffered from standards which were vague, ambiguous, uncertain, overbroad, unworkable, abstract, futile, hypothetical and unascertainable. These standards were held to be constitutionally unacceptable. This Court has stated that vague laws "offend several important values". Persons of ordinary intelligence must be given "a reasonable opportunity to know what is prohibited". Moreover, vague laws "may trap the innocent by not providing fair warning". Additionally, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them". Vague laws also "impermissibly delegate basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application". *Grayned v. City of Rockford*, 408 U.S. 104, 108-109.

We deal here, therefore, with convictions which were obtained under unconstitutional and arbitrary standards. Under such circumstances, the notion that the *Miller* decisions rendered by this Court did no more than ease convictions in obscenity prosecutions, and that petitioners have no grounds for complaint if they were convicted under standards deemed more stringent for the prosecution, even if those standards have been held to be unconstitutional, is, it is submitted, unpersuasive. As was stated by the Court of Appeals in *Levy v. Parker*, 478 F.2d 772, 795 (3 Cir. 1973): "A consideration based on ease-of-conviction is now totally bereft of explicit support and does not deserve the dignity of extended discussion."

In light of all the foregoing, petitioners respectfully submit that the impact of the decisions rendered by this Court on June 21, 1973, upon the judgments of conviction herein, which rest on standards deemed constitutionally unacceptable by this Court, raises questions of substantial importance which should be decided by this Court.

Petitioners turn now to the Federal questions of substantial importance, presented in the case not previously decided by this Court, aside from the questions presented as a result of the *Miller* decisions.

B.

4. The requirement of proof of *mens rea* is virtually a universal rule in mature systems of law. *Morissette v. United States*, 342 U.S.246, 250. One is ordinarily not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. Without knowledge, the intent cannot exist. *United States v. Falcone*, 311 U.S.205, and in order to establish the intent, the evidence of knowledge must be clear, not equivocal. *Estep v. United States*, 140 F.2d 40, 45 (10 Cir. 1943). These *scienter* requirements, common in criminal prosecutions, are subject to stricter requirements when proceedings implicate First Amendment rights. *Speiser v. Randall*, 357 U.S.513, 520.

In *Roth v. United States*, 354 U.S.476, this Court emphasized that the ambiguities of the standards for judging obscenity could not be reconciled with the due process guarantees of fair notice without proof of guilty knowledge and specific intent. See, cases cited in *Roth*, 354 U.S. at 491-492, and repeated in *Miller v. California*, 93 S.Ct. at 2617, n.10.

The discrete questions as to the standard for judging *scienter*, and the quality and quantity of proof necessary to satisfy such standards, have never been definitely settled, but should be settled, by this Court. In *Smith v. California*, 361 U.S.147, the Court held that it was constitutionally impermissible to dispense entirely with the element of *scienter* in an obscenity prosecution. Justice Brennan, writing for the Court, stated: "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be." (361 U.S. at 154).[10] In *Mishkin v. New York*, 383 U.S.502, the Court approved a construction of the state obscenity statute which required proof that the accused was in some manner aware of the "character" of the material, together with proof of "calculated purveyance" of the alleged obscene material (383 U.S. at 510). At the same time, the Court rejected a standard which would require mere proof of "knowledge of the contents of the books" (383 U.S. at 510, fn.9). Again

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[10]Justice Black agreed that the ordinance could not penalize a bookseller, even though he was not aware of its "obscenity" (361 U.S. at 156). Justice Frankfurter understood the Court's opinion as holding that one could not be accused of violating the obscenity law unless he was charged with "knowledge of the obscenity" (361 U.S. at 161). See, the opinion of Justice Harlan (361 U.S. at 170) and Justice Harlan's opinion for the majority in *Manual Enterprises, Inc. v. Day*, 370 U.S.478, 492-493, and fn.16. See also, *New York Times Co. v. Sullivan*, 376 U.S.254, 278-279.

the Court reiterated that it was not yet prepared to define what sort of mental element was requisite to a constitutionally permissible obscenity prosecution (383 U.S. at 511), but the Court emphasized that the Constitution requires proof of *scienter* to avoid the hazard of self-censorship of constitutionally protected material and to compensate for "the ambiguities inherent in the definitions of obscenity" (383 U.S. at 511).[11]

In *Redrup v. New York* and *Austin v. Kentucky*, 384 U.S.916, certiorari was granted in both cases, limited solely to those questions which presented the issue of *scienter* in the petitions. In the *per curiam* decision which followed, however, the Court decided that the material involved in the cases was not "obscene", the decision being made "without prejudice to the questions upon which review was originally granted". *Redrup v. New York* [*Austin v. Kentucky*], 386 U.S.767, 770. In his dissent, Justice Harlan noted that in *Smith v. California* a defendant criminally charged "with purveying obscene material must be shown to have had some kind of knowledge of the character of such material; the quality of that knowledge, however, was not defined", and Justice Harlan expressed regret that the Court had not "come to grips with such issues" (386 U.S. at 771-772).

A related scienter issue is pending before this Court. *Kirkpatrick v. New York*, Oct. Term 1973, No. 73-104.

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[11]The indictment here did not allege petitioners' knowledge of the character of the brochure or specific intent to mail the alleged obscene material, and petitioners argued in the trial court and in the court below that this rendered the indictment constitutionally inadequate [C.T. 29-31; R.T. Vol. C 76-94; R.T. 78]. *Cf.*, 383 U.S. at 511, n.11. See, *United States v. Orito*, 93 S.Ct. at 2676, n.2.

The essential argument of the government below was solely one of prosecutorial convenience, to wit, that proof of the essential facts would permit violators to avoid liability by peading lack of knowedge of the facts. This argument has been as often rejected as it has been made. See, Hall, *General Principles of Criminal Law* 349, 2d Ed. 1960; *Smith v. California,* 361 U.S. at 154; *United States v. Stagman,* 446 F.2d 489, 493 (6 Cir. 1971).

To permit the conviction of an accused in an obscenity prosecution solely on the basis of purported proof that the accused knew the "contents" of the material is to impose the absolute criminal liability condemned by this Court in *Smith v. California.* Sex and obscenity are not the same, and knowledge of the "contents" of a publication dealing with sex cannot be the equivalent of knowledge of the obscenity of the publication. Mere proof that a publisher or distributor knew the contents of the multifold books, magazines and films ultimately held to be entitled to constitutional protection by this Court and other courts plainly fails to establish that such publisher or distributor knew the material was obscene. See, for example, *Grove Press, Inc. v. Gerstein,* 378 U.S.577, rvg. 156 So.2d 537 (1963) (Tropic of Cancer).

It follows, therefore, that mere proof of "knowledge of contents" cannot be the standard for judging *scienter,* since such standard alone would leave the federal obscenity statute vague, ambiguous, uncertain and overbroad, in violation of the provisions of the First Amendment. Prosecutions under such a standard would violate the due process guarantees which accompany any criminal trial. A jury would be left free to presume

guilty knowledge under the federal obscenity statute by its own subjective predilections, on the basis of arbitrary and irrational inferences and presumptions which undermine all procedural safeguards required in criminal prosecutions, particularly involving speech and press. *Bailey v. Alabama,* 219 U.S.219; *Tot v. United States,* 319 U.S.463; *Speiser v. Randall,* 357 U.S.513. Such an arbitrary standard would encourage the self-censorship and private suppression of constitutionally protected material. *Smith v. California,* 361 U.S.147; *New York Times Co. v. Sullivan,* 376 U.S.254.

If an accused may be convicted without any proof that he knew that the material was obscene, and without any possibility of establishing in his own defense his honest ignorance that the material was obscene, then the trial of an obscenity prosecution becomes inherently unfair, and the right to confront witnesses, to present evidence in one's own behalf, and to have the assistance of counsel and a determination by an impartial jury become meaningless. Such a determination by a jury, based on its own subjective predilections, is no more than an *ex post facto* determination which visits upon the accused cruel and unusual punishment in the most primary sense of the terms. The notion that everyone "must take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd and lascivious" has been rendered untenable by the decisions of this Court since *Roth,* through *Jacobellis, Memoirs, Ginzburg, Redrup, Stanley,* and the June 21 decisions, as well as by the changing social conditions, attitudes, and "sexual revolution" (*Miller v. California,* 93S.Ct. at 2621) of the past decades. See, *Griswold v. Connecticut,* 381 U.S.479; *Eisen-*

stadt v. Baird, 405 U.S.438; *Doe v. Bolton*, 93 S.Ct. 739; *Roe v. Wade*, 93 S.Ct.705; *United States v. Klaw*, 350 F.2d 155 (2 Cir. 1965); and *The Report of the Commission on Obscenity and Pornography*, September 1970.

5. The charge against these petitioners was that they conspired to mail the alleged obscene brochure, or aided and abetted the mailing of the said brochure. There is not the slightest competent evidence in the record to establish that these petitioners entered into a corrupt agreement with the specific intent to do something which the law forbids, nor is there any evidence in the record to show that these petitioners were aiders and abetters; that petitioners in any way shared in some criminal intent and community of unlawful purpose at the time when the brochure was mailed from the Central District of California (North Hollywood). See, *Shuttlesworth v. Birmingham*, 373 U.S.262, 265; *Thompson v. Louisville*, 362 U.S.199.

Since proof of *scienter* depends on each individual's own acts and declarations, it was constitutionally impermissible to ascribe guilty knowledge and intent to the individual petitioners merely because they were officers of a corporation or engaged in normal intra-corporate activities wholly unrelated to the specific charges contained in the indictment under which petitioners were tried. ". . . under our traditions beliefs are personal and not a matter of mere association, . . ." *Schneiderman v. United States*, 320 U.S.118, 136.

As to the claim of *scienter* on the part of each of these petitioners, under the conspiracy and aiding and abetting charges, the government has never contended and does not claim that any of these petitioners was

in any manner aware of the operative facts which bring the provisions of 18 U.S.C. §§ 371 or 1461 into play. In short, there was never any attempt to prove that these petitioners had any knowledge that the brochure allegedly exceeded contemporary community standards, or appealed to prurient interest, or was utterly without social value. There was no attempt to prove that these petitioners acted in reckless disregard of whether or not the brochure allegedly fell within the purview of the federal obscenity statute. There was no proof that these petitioners even intended to commit a public wrong. The case was tried on the theory that the conspiracy and aiding and abetting charges were established, insofar as the issue of *scienter* was concerned, by proof that each of the petitioners allegedly knew the "contents" of the brochure.

It is to this last issue which the petitioners now address themselves. Without regard to the validity of a standard which judges *scienter* under the federal obscenity statute merely by proof of knowledge of contents of the material involved, petitioners maintain that there was no competent evidence to show that petitioners knew the contents of the brochure. The petitioners were not charged with unlawfully renting a post office box, nor did the jury agree that "mailing packets of the Report to those postal patrons responding to the advertising Brochure" was a violation of the federal obscenity law (App. A, p. 6). On the government's theory, and as the case was tried, the sole charge against these petitioners was that they knew the contents of the brochure mailed from North Hollywood. There is no evidence in the record which would justify a finding in reason that each of these petitioners had such knowledge.

With respect to the petitioner David L. Thomas, there is no evidence in the record, it is submitted, which would justify the slightest finding in reason that this petitioner had any connection with the preparation or mailing of the advertisement or that he in any way knew the "contents" or the "nature and character" of the advertisement. Petitioner Thomas was listed in some of the corporate documents offered by the government as a vice-president of the various corporations when he signed bank signature cards or license applications, and the like. There was no other evidence against this petitioner, oral or documentary. There was not the slightest evidence in the record that petitioner Thomas had anything to do with the advertisement.

The evidence in connection with the advertisement, insofar as petitioner Shirley Wright is concerned, is in similar fashion entirely negative. The government documents, which covered a period back to 1965 and prior thereto, appeared to indicate that Shirley Wright was in the employ of some of the corporations at that time; that she was listed as an officer and a member of the Board of Directors of several of the corporations; that she signed waivers of notices of meetings and signed as an officer of the corporation. In most instances she was designated secretary or secretary-treasurer, and it is apparent that she did the work of a secretary and office manager in the business of Reed Enterprises, Inc. There is no evidence to indicate that she received a salary as an officer or remuneration for attending meetings of the Board, and a reasonable inference is that much of the official designation was for the convenience of her employer. There is nothing in the documentary evidence to indicate in any way that petitioner Wright was at all involved in

any way in anything else than office management. Insofar as the advertisement is concerned, there is again not the slightest evidence to indicate that she knew anything about the mailing of the brochure, the preparation of the advertisement, or that she in any way knew anything about the "contents" or the alleged "nature and character" of the contents of the said advertisement.

Insofar as the petitioner Earl Kemp's relationship with the advertising brochure here involved is concerned, the evidence is similarly barren. The only evidence to which the court below could point was that petitioner Kemp had one time signed a postal service document for a rental of a post office box, No. 20308, on behalf of petitioner Library Service, Inc. The fact is, as the record clearly reveals, petitioner Kemp's only activity as shown in the record was that he served as editor of *The Illustrated Report*, upon the alleged obscenity of which the jury could not agree. The record clearly reveals that the post office box had already been in the name of Library Service, Inc. sometime prior to the date when petitioner Kemp affixed his signature; that as a result of the urging of a postal inspector who conducted the investigation which led to the prosecution herein, a post office employee was sent to San Diego to insist that new signatures appear on the applications for the post office box; that petitioner Kemp was called out of his editorial office to sign an application at the instance of the postal employee; that petitioner Kemp did not know whether or not he held an officership in Library Service, Inc.; that he was informed that he was occupying the nominal position of vice-president and then signed as a mere formality [R.T. 1038-1067]. There was simply no evidence con-

cerning petitioner Kemp which in any way indicated that he had anything to do with the preparation of the advertising brochure which emanated from a Regent House in North Hollywood, and there is no evidence to indicate that he had anything to do with the mailing or had any knowledge of the "contents" or "nature and character" of the contents of the material. In support of a motion for judgment of acquittal or, in the alternative, for a new trial and arrest of judgment [C.T. 1123], the petitioner Kemp submitted a sworn affidavit indicating that he knew nothing concerning the preparation or contents of the advertisement and that, as a matter of fact, at the time the brochure was allegedly prepared and mailed in North Hollywood petitioner Kemp was in Europe on a business trip.

With respect to petitioner Hamling, the only evidence in the record is a check from Reed Enterprises, Inc. to London Press, Inc. in the sum of $4,843.14, and another check from Reed Enterprises, Inc. to Regent House in the sum of $3,817.80, each signed by petitioner Hamling. There is no other evidence in the record that in any way, by act, declaration or statement, connects petitioner Hamling with the mailing of the brochure or with any knowledge of its contents or its nature and character.

With respect to the corporate petitioners, the sole evidence relating to Reed Enterprises, Inc. is the issuance of the two aforesaid checks, and the sole evidence relating to hte corporate petitioner Library Service, Inc. is the appearance of its name on the brochure.

Assuming, *arguendo*, that proof of "knowledge of contents" is sufficient to justify a finding of scienter in a federal obscenity prosecution, it is nevertheless submitted that on the record herein there was a complete

absence of competent evidence to establish, beyond a reasonable doubt, that each of these petitioners, or any of them, had the requisite scienter. See, *In re Winship*, 397 U.S.358; *Speiser v. Randall*, 357 U.S. 513; *Thompson v. City of Louisville*, 362 U.S.199; *Tot v. United States*, 319 U.S.463. That an individual is an officer in a corporation, or a member of the board of directors, or as an officer of a corporation signs a check in payment of a bill is, it is submitted, not sufficient in itself to support a finding of scienter as required under the Constitution in a federal obscenity prosecution. An officer of a corporation cannot be held criminally responsible for an act done by third parties, unless the officer personally or actually did the act himself, or the acts were done under his immediate direction and knowledge. There is no evidence in this record to indicate by whom the brochure was prepared, and the only evidence in the record is that the brochure emanated from North Hollywood through Regent House and individuals connected with Regent House, and that the brochure was also printed in North Hollywood, the printer never having been called by the Government to testify. There is therefore no evidence to indicate any personalized, individual knowledge on the part of any of these petitioners.

In the light of all the foregoing, there was of course no proof that these petitioners entered into a conspiracy to mail the brochure in violation of the federal obscenity statute. There was no proof of a combination or agreement to disobey or to disregard the law. Nor was there any proof of aiding and abetting, because there was no proof of the specific intent which the law requires.

The instructions of the trial court on the issue of scienter and the related issues, conspiracy and aiding

and abetting, were clearly erroneous and contradictory. In effect, the statute, as construed by the trial court, licensed the jury to create its own standard in judging the questions of scienter, conspiracy and aiding and abetting. See, *Bollenbach v. United States*, 326 U.S. 607.

6. The brochure here involved is neither obscene in fact nor in law. The advertisement is entitled to constitutional protection. The brochure advertises a book entitled *The Illustrated Presidential Report of the Commission on Obscenity and Pornography. The Illustrated Report* in itself is presumptively entitled to constitutional protection and the jury in this very case could not agree that it was obscene. That the *Report of the Commission* is itself of great social value cannot be disputed, and *The Illustrated Report* similarly has social value and importance. See, reference to *The Illustrated Report* in *United States v. Palladino*, 475 F.2d 65, 76, n.1 (1 Cir. 1973). Indeed, the record established that *The Illustrated Report* with its pictures were in one sense more valuable than the official *Commission Report*. One of the Commissioners of the Commission, Dr. Otto N. Larsen, Chairman of the Effects Panel of the Commission, testified that the illustrations in the book enhanced the value of the *Report;* that the illustrations made clear what the *Report* was discussing and made it easier for persons to make judgments as to the recommendations made by the Commission [R.T. 4229-4286]. Each of petitioners' experts, whether from the Commission or from various universities where they were teaching, testified as to the increased value of *The Illustrated Report*. As heretofore stated, additionally, the Government stipulated that every picture in *The Illustrated Report* was

related to the text of *The Commission Report;* that pictures similar to those appearing in *The Illustrated Report* were used in various research activities that the Commission undertook; and that the photographs and other illustrations in *The Illustrated Report* depict explicit sexual material within the definition of that term as it was used by the Commission in its *Report* [R.T. 3359-3360, 3516].

The brochure herein involved fairly and accurately advertised *The Illustrated Report.* Each of the depictions contained in the brochure is contained in *The Illustrated Report.* The brochure advises the reader that the book advertised contains the complete text of the *Report of the Commission.* It states, correctly, that the depictions contained in the brochure, taken from *The Illustrated Report,* could have been part of the studies made by the Commission. The brochure emphasizes that the President is to be criticized for dismissing *The Report of the Commission* "out of hand"; that suppression of the *Report* is demeaning to every adult; that adults should be allowed to make their own decisions and that many of them probably will do so after reading the *Report*; that the book is a "must" for the research shelves of every library seriously concerned with intellectual freedom and adult selection. In short, the brochure communicates information about the book it is advertising, *The Illustrated Report;* expresses opinions about it; expresses political views concerning the *Report*; and urges the public to read it. Under the circumstances, therefore, the brochure cannot be deemed to be utterly without redeeming social value or importance and, even if the new standards enunciated by this Court could be retroactively applied in the case herein, the brochure plainly has serious political and scientific value.

The record in the case establishes, it is submitted, that the dominant theme of the brochure herein, taken as a whole, does not appeal to a prurient interest, does not exceed contemporary community standards, has social value as well as serious political and scientific value. Advertising in today's milieu, in its multifold forms in all areas of communication, serves useful purposes. It serves as a means of informing the community of the availability of material upon which members of the community can reach informed judgments. In the case herein, the community was being informed by the brochure that the important *Report* of a Commission had been filed with the President of the United States dealing with issues of obscenity, with important conclusions reached thereto with respect to the right of adults to read and view depictions and representations of explicit sexual activities. The public, it is submitted, was entitled to know that such a *Report* existed, the nature and character of the *Report* and the criticisms directed at the Executive Department for rejecting the *Report*.

The issue before the courts below was not whether or not a different brochure could have been written. The sole question was whether or not the brochure was entitled to First Amendment protection and, on this issue, it is submitted, the answer is clearly in the affirmative.

7. The trial court excluded an entire category of evidence offered by petitioners which bore importantly on the issues of obscenity and scienter. The Court stated that under no circumstances would it permit the jury to consider, nor would the Court itself consider, any comparison of the contents of the material involved in the prosecution with that of other compa-

rable material openly published, widely distributed and generally accepted by the community. Thus, the jury was permitted to conclude that the material involved exceeded the limits of candor set by contemporary community standards without ever being permitted to receive evidence as to the kinds of explicit sexual material the community generally tolerates.

The vice of excluding evidence offered by an accused pertinent to the essential issues involved in the determination of "obscenity" is that "the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be punished". *Speiser v. Randall*, 357 U.S.513, 526. Deprivation of the right to present evidence bearing on the issues in a case has been specifically adjudged by this Court to be a denial of due process. *Saunders v. Shaw*, 244 U.S.317, 319; *Chin Yow v. United States*, 208 U.S.8, 11-13. "The community cannot, where liberty of speech and press are issues, condemn that which it generally tolerates. This being so, it follows that due process—'using that term in its primary sense of an opportunity to be heard and to defend [a] substantive right', *Brinkerhoff-Faris Trust and Sav. Co. v. Hill*, 281 U.S.673, 678, 50 S.Ct.451, 453, 74 L.Ed. 1107—requires a State to allow a litigant in some manner to introduce proof on this score." *Smith v. California*, 361 U.S.147, 171-172.

If a trier of facts cannot learn from an examination of comparable material generally accepted in the community what it is that the community tolerates and what courts have held to be constitutionally protected, then the trier of the facts, just like the accused, is left wholly at sea and compelled to make a determination that is purely subjective. This renders the

obscenity statute plainly vague, ambiguous, uncertain and overbroad and in conflict with the guarantees of the First Amendment. In fact, the courts have indicated again and again that it is only by resort to the use of comparable testimony that any rational decision can be made as to whether specific material offends contemporary community standards.

The Court of Appeals upheld the rulings of the trial court upon the ground that the trial court, in the exercise of its discretion, had rejected the evidence because "they tend to confuse the jury"; because the mere fact that comparable material was sold and purchased in "book stores around the country does not make them witnesses of virtue"; and because the comparable materials offered by petitioners were not "relevant" and "had no logical or reasonable social value attributed to them" for the jury to consider in determining the obscenity or nonobscenity of the brochure.

These considerations overlook the fact that the trial court excluded all comparable material as an entire category. The trial court merely concluded that it would permit the introduction of evidence by petitioners in only one category, to wit, the testimony of experts, but the jury was refused permission to examine the very books, magazines, pictures, etc., commonly accepted in the San Diego and national communities upon which the experts were commenting. The issue here, therefore, is not whether the comparable material would have been "confusing". The trial court could have always, of course, limited the amount of material submitted. The important issue is that all of the comparable testimony was excluded, without exception. It was for the jury to determine the weight to be given to such evidence; it was for the jury to determine

whether the material was sufficiently comparable in all respects to the brochure under consideration. The trial court had before it reasonable alternatives with respect to the admission of the quantity of evidence offered by petitioners. There was no possible justification for wholly denying petitioners all opportunity to present an entire category of testimony in their defense, even to the extent of excluding comparable material held entitled to constitutional protection by this Court. The petitioners here were deprived of essential exculpatory testimony for no legitimate reason, it is submitted.

8. Rule 30 of the Federal Rules of Criminal Procedure was specifically amended in 1966 to provide that opportunity should be given to counsel for the accused to make objection out of the hearing and of the presence of the jury whenever request is so made by the accused. In the case herein, there is no dispute that counsel did make such request after the trial court instructed the jury and before the jury retired for its deliberations. Counsel's request was denied and counsel was therefore compelled to make objections to the judge's charge in the presence of the jury, and possibly within the hearing of the jury. The objections voiced by counsel to the court's instructions covered a broad area. There were objections to the court's instructions on scienter; to the court's instructions on the elements of obscenity; to the court's instructions with respect to sexually deviant groups; to the court's instructions on pandering; to the failure of the court to give many of petitioners' proposed instructions, together with argument that the instructions given and instructions refused denied petitioners their rights under the Constitution. In the presence of the jury, petitioners also objected to the court giving the Indictment to the jury

to take into the jury room [R.T. 4978-4981]. The indictment had been specifically attacked as unconstitutionally vague.

It is perfectly clear and it is not disputed by the opinion of the Court of Appeals that error was committed. Nevertheless, the opinion of the Court of Appeals, declining to follow the rule of other Circuits, holds that error was not prejudicial. Such a ruling, in the light of the record here, completely negates the purpose and intent of the provisions of Rule 30, and specifically the amendment of 1966.

The opinion of the Court of Appeals chose to adopt the alleged view of the Third Circuit that prejudice must be demonstrated from an examination of the whole record, pointing to *United States v. Schartner*, 426 F.2d 470 (3 Cir. 1970). In actuality, the *Schartner* case does not support the position adopted by the Ninth Circuit. The Third Circuit concluded in the *Schartner* case that Rule 30 contains an "explicit and mandatory direction to trial courts", and "that there should be reversal for non-compliance with Rule 30 even where the defendant cannot affirmatively prove prejudice" (426 F.2d at 479). Moreover, the Tenth Circuit has specifically held, in light of the history of Rule 30, that failure to comply with the provisions of the Rule, and to permit counsel to make objections to the jury charge out of the hearing and the presence of the jury, is clear reversible error. *Hall v. United States*, 378 F.2d 349 (1967).

The Court of Appeals below appeared to believe that the prior settling of instructions in some way mitigated the prejudice resulting from the failure to permit counsel for the accused to make objections to the court's instructions after they had been given to the

jury, and out of the presence of the jury. In the opinion of the court, the fact that counsel had made prior objections during the settlement of instructions made it "unnecessary" for counsel to make objections after the court's charge in order to preserve his record. It is clear, however, from the very provisions of Rule 30 that despite the prior settling of instructions, counsel is under a duty to make specific objections to the court's instructions to the jury after such instructions have been given, and that failure to make such objections might result in a claim of waiver by the government or a ruling of waiver by the appellate court.

The entire purpose of Rule 30 is to avoid hearing objections at the Bench while the jury waits to receive the case. Such bench conferences put pressure on all the participants, both judge and counsel, to truncate the consideration of their arguments and consideration of the objections which are being made. Moreover, petitioners here were forced to place themselves in an antagonistic position to the trial judge by having to object, extensively, to the trial judge's instructions and to have all of their objections rejected by the trial judge. The psychological disadvantages suffered by petitioners under such circumstances have been frequently noted by the courts, in calling for strict observance of Rule 30. See, *United States v. Fernandez*, 456 F.2d 638, 644, n.6 (2 Cir. 1972); *Hodges v. United States*, 243 F.2d 281, 283 (5 Cir. 1957); *Lovely v. United States*, 169 F.2d 386, 391 (4 Cir. 1948). Rule 30, and its amendment, was enacted in its specific form for the very reason that there is no way of determining nonprejudice under the circumstances here involved.

9. The opinion of the Court of Appeals concedes that the only charge was that the dominant theme of the brochure, taken as a whole, appealed to the prurient interest of the average person. The trial court's instructions, as set forth in the opinion, make it clear that the jury was instructed that the question of appeal to prurient interest could be measured "by the average or ordinary adult *or* by a clearly defined deviant group" (App. A, p. 29) (emphasis added). The jury was therefore left free to return a verdict of guilt even if the brochure did not appeal to the prurient interest of the average person. See, *Stromberg v. California,* 283 U.S. 359. The instruction was contrary to the principles enunciated in *Roth, Memoirs* and *Mishkin.*

It should be noted that in response to petitioners' motion for a bill of particulars, the government alleged that the brochure in question appealed to the prurient interest of the average person [C.T. 175]. Nevertheless, and over the continuing and strong objection of petitioners [R.T. 1696, 1701, 1739-1745], the government's alleged expert witness was permitted to testify that the material appealed to the prurient interest of sexually deviant groups. The trial court, in permitting the government to introduce evidence with respect to the appeal of the material to a sexually deviant group, instead of limiting the evidence to the impact of the material on the average man, stated that he did not know what the "Supreme Court" meant "by the average man" [R.T. 1747, 1749]. The Court of Appeals below recognized that all of this was error, but stated that the testimony of the government's expert witness was directed to "The Illustrated Report" (App. A, p. 28). However, the evidence before the jury involved the depictions in the brochure, which were the same

as those in "The Illustrated Report" about which the expert testified.

The court below assumed that the opinion testimony of the government's witness constituted a variance of proof under the government's answer to the bill of particulars, but stated that this was not prejudicial to petitioners as their own expert opinion testimony allegedly covered the same field (App. A, p. 30). However, the court overlooked that counsel for petitioners at the trial, before asking their own expert his opinion as to whether the material appealed to the prurient interest of any sexually deviant group, specifically requested the trial court before beginning direct examination of the witness to limit the trial to the impact of the material upon the "average person". It was only when the court refused to limit the testimony that petitioners' counsel was compelled to meet the government's testimony by petitioners' own witnesses [R.T. 3401-3405, 3421-3423].

10. There is no statutory provision, there never was any charge made in the indictment, and there is not the slightest proof in the record of "pandering". The instruction given by the trial court on this issue was therefore completely erroneous and prejudicial. See, *DeJonge v. Oregon*, 299 U.S.353; *Cole v. Arkansas*, 333 U.S.196; *Rabe v. Washington*, 405 U.S.313. It cannot be contended that the brochure herein, in itself, constitutes "pandering" as defined or used by this Court in *Ginzburg*. The brochure here does not "proclaim" "The Illustrated Report" to be obscene. Indeed, the text of the brochure asserts the very opposite. The entire purport of the brochure is that "The Illustrated Report" furthers knowledge and understanding of importance to all adults.

11. All criminal proceedings, including Grand Jury proceedings, are subject to the dictates of the Due Process Clause of the Fifth Amendment. The opinion of the Court of Appeals in its quotations from the record amply establishes that the prosecutor made misleading and emotionally charged remarks to the Grand Jury with respect to the standards for judging obscenity and also appealed to their biases and prejudices by references to their "instinctive" feelings and "moral judgments". The existence of bias and prejudice, with prosecutorial misdirection on the applicable law, vitiates the indictment. See, *Beck v. Washington*, 369 U.S.541, 546. The presumption of regularity is unavailable here, it is submitted. *Wilson v. United States*, 369 F.2d 198, 200 (D.C. Cir. 1966).

12. The Court of Appeals below assumed, without deciding, that the young do constitute a cognizable class or group, but held that it was not a legal abuse of discretion to deny a short continuance which would have assured the presence of members of such class in the jury pool. The opinion describes such assurance as merely a "hope" (App. A, p. 13), but the testimony of the Jury Commissioner made it clear that a short continuance of one month would mean the addition of excluded young persons to the jury wheel. See, 28 U.S.C. Section 1867(d). The guarantee that the selection of a jury will be from a cross-section of the community is a guarantee of constitutional dimensions, and, it is submitted, that it was fundamental error to deny petitioners such right.

13. On *voir dire* in this obscenity prosecution, petitioners sought inquiry into the background and religious attitudes of the jurors to enable them to exercise intelligently their challenges for cause and peremptory challenges. Inquiry into this basic area was essential to a fair trial. *Ham v. South Carolina*, 93 S.Ct.848; *United States v. Dellinger*, 472 F.2d 340, 366-370 (7 Cir. 1972).

The Fourteenth Amendment guarantees to an accused a trial by an impartial jury. *Groppi v. Wisconsin*, 400 U.S.505; *Duncan v. Louisiana*, 391 U.S.717. The right to challenge prospective jurors for cause on account of bias or prejudice is essential to the constitutional guarantee of an impartial trial because it is the principal, if not the only, means by which a criminal defendant can secure an impartial jury. The right of challenge for cause on account of bias or prejudice is a fundamental component of the right to a jury trial. A *voir dire* examination of prospective jurors in connection with the exercise of challenges for cause is a widely recognized principal, if not the only, means of selecting an impartial jury. By refusing to ask the questions proposed by petitioners, the trial judge effectively denied petitioners any opportunity to have the prospective jurors examined on *voir dire* with respect to whether they were prejudiced against petitioners. A specific inquiry along the lines suggested by petitioners was particularly vital under the circumstances of the present case.

Conclusion.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Attorney for Petitioners William L. Hamling, Reed Enterprises, Inc. and Library Service, Inc.

SAM ROSENWEIN,
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LOUIS S. KATZ,
Of Counsel.

APPENDIX A.

Opinion and Judgment of the Court of Appeals for the Ninth Circuit.

Filed: June 7, 1973.

Dennis R. Mathews, Clerk U.S. Court of Appeals.

In the United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. William L. Hamling, Earl Kemp, Shirley R. Wright, Reed Enterprises, Inc., David L. Thomas and Library Service, Inc., Defendants-Appellants. Nos. 72-1892, 72-1893, 72-1894, 72-1895, 72-1896, 72-1897.

OPINION

Appeal from the United States District Court for the Southern District of California.

Before: BARNES and JERTBERG, Circuit Judges, and EAST, District Judge*

EAST, District Judge:

STATEMENT OF THE CASE

On March 5, 1971, the Grand Jury for the Southern District of California indicted the above-named defendants, William L. Hamling (Hamling), Earl Kemp (Kemp), Shirley R. Wright (Wright), David L. Thomas (Thomas), Reed Enterprises, Inc. (Reed), Library Service, Inc. (Library), the appellants, and Greenleaf Classics, Inc. (Greenleaf), on 21 counts of alleged violation of Title 18 U.S.C. Sections 2, 371 and 1461.

Count 1 charged the defendants and various other unindicted co-conspirators with conspiring to cause to be delivered by mail obscene advertisements (Brochure), obscene books (Report) and

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

advertisements giving information as to where, how and from whom and by what means the Report might be obtained. (Sections 2, 371 and 1461.)

Counts 2 through 14 charged the defendants with the knowing use of the mails for the carriage and delivery of the Brochure alleged to be a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement to a named postal patron. (Sections 2 and 1461.)

Counts 15 through 18 charged the defendants with the knowing use of the mails for the carriage and delivery to a named postal patron of the Brochure giving information where, how, from whom and by what means the Report alleged to be an obscene, lewd, lascivious, indecent, filthy and vile book entitled "The Illustrated Presidential Report of the Commission on Obscenity and Pornography" might be obtained. (Sections 2 and 1461.)

Counts 19 through 21 charged the defendants with the mailing of the Report.

Pre-trial Motions:

The appellants and Greenleaf moved:

a) *To dismiss the indictment* because it failed to inform them of the nature and cause of the charges in violation of the Fifth and Sixth Amendments to the United States Constitution. This motion was denied.

b) *For a Bill of Particulars.* This motion was, except for a continuing order requiring the government to answer certain requests of the defendants and for discovery and inspection theretofore ordered, denied. The inspection ordered provided, inter alia, that "All available exhibits to be used in the prosecution of this matter will be premarked at pretrial October 6, 1971,

and made available to defendants for inspection. Failure to pre-mark available exhibits prior to the date of trial will result in their exclusion by the court at time of trial."

c) *To dismiss the Indictment* because no evidence was presented to the Grand Jury which would justify a finding, based on reason, that the publications named in the Indictment were obscene. The motion was denied and there followed a petition to this court for a Writ of Mandamus number 71-2550 which was denied. Whereupon the motion to dismiss was renewed because the government had improperly invited the Grand Jury to return the Indictment "by passion and prejudice" and in "total absence of evidence with regard to obscenity." In support of this motion, the defendants called the government's counsel as a witness to relate the evidence produced and procedure followed before the Grand Jury. The motion as renewed was denied.

d) *To challenge the petit jury panel and to strike the venire* because the jury plan systematically excluded all persons under 25 years of age. The Clerk of the court was called as a witness and testified that the master wheel from which appellants' trial jury would be drawn was filled in 1968 with the names of persons who were registered voters at that time, and that the procedures followed in selecting the names of the registered voters were in accordance with the District Court's plan.

The defendants produced evidence which they claim tended to establish that:

1. Young persons were a cognizable group and were more tolerant than older persons in matters per-

taining to the depiction of sexually explicit material; and

2. The venire contained no persons with an age below 24 years.

The motion was denied.

e) For a month's continuance of the trial awaiting the drawing of a new venire. The motion was denied.

Trial:

The trial commenced on October 15, 1971, and the jury returned its verdict on December 23rd next. At close of the government's case in chief, the trial court dismissed Counts 6, 14, 18 and 20 for a failure of proof. The defendants moved for a judgment of acquittal on the remaining Counts and again at the close of all of the evidence, which motions were denied. After instructing the jury and while the jury remained in the box, the District Court invited counsel to approach the bench for the notation of objections to the instructions. The defendants requested the court to retire the jury and to hear further objections to the instructions. The trial court declined and heard counsel in close conference out of the hearing, but in the presence of the jury.

The jury found the defendant Greenleaf not guilty on the Counts submitted to them, and all of the appellants guilty on Counts 1 through 5 and 7 through 13 (the conspiracy count and the counts charging the obscenity of the Brochure and the mailing of the same). The jury was deadlocked and unable to reach verdicts on Counts 15, 16, 17, 19 and 21 (the Counts alleging the obscenity of the Report and the mailing thereof). The appellants moved for an arrest of judgment, for a new trial and an acquittal, all of which were denied.

Sentences:

The individual appellants were sentenced to various concurrent and consecutive terms of custody and fines and terms of probation. The corporate appellants were sentenced to fines. The appellants appeal. The individual appellants are at liberty on bail. We affirm.

STATEMENT OF FACTS

We narrate the record evidence as follows: Some of the named postal patrons testified that they received through the mails the challenged Brochure advertising the Report and of their respective reactions upon receipt.

The mailings consisted of an outer envelope bearing the postmark of North Hollywood, California, dated January 12, 1971, and inner return envelope addressed to Library, Post Office Box 20308, San Diego, California, and the Brochure itself, identifying Library as the mailing party. The outer envelope bore postage affixed by Pitney Bowes meter number 173583 (meter). The actual mailing of the material was made by an independent mailing and addressing service and was a part of a total of 55,000 mailings with affixed postage of the packets. The Brochures, mailing material and the meter had been supplied to the mailing service by a Bernard Lieberman of Regent House, Inc. (Regent), of North Hollywood, California, an unindicted alleged conspirator, which was billed $541.15 by the addressing service for the mailing services.

Regent was the lessee of the meter and had paid, through a Paul Wisner, $3,300 to the United States Postal Service for a setting of that amount of postage on the meter. Regent billed and Reed paid the mailing service charge and postage fees with its check signed by its officer, Hamling.

Kemp and Wright signed Postal Service documents for the rental of Post Office Box 20308 on behalf of Library.

A second Pitney Bowes postage meter was rented by Thomas and installed at Library for use in affixing postage to the mailing packets of the Report to those postal patrons responding to the advertising Brochure.

The individual appellants were responsible staff, policy decision making and operating members of the corporate appellants as distinguished from mere "figurehead" officers and directors of their respective corporations.

The Brochure and the Report, as respectively mailed, were each received in evidence.

The government called two experts for opinion testimony advisory to the jury, a Dr. Melvin Anchell, of Los Angeles, a practicing Medical Doctor and practicing Psychiatrist, who qualified as an expert on prurient appeal, and a Frank Getlein, a columnist with the Washington Evening Star in Washington, D. C., who qualified as an expert on contemporary community standards regarding the depiction of sexual activity, and on redeeming social value of written and pictorial communications. The opinions of these experts in their respective fields on the issue of obscenity *vel non* of the Brochure and the Report respectively was that the dominant theme of each was "pruriency," each was patently offensive to contemporary community standards, and was utterly without redeeming social value.

The appellants called five experts for opinion testimony advisory to the jury on the same issue of obscenity, a Dr. Otto N. Larsen, one of the Commissioners of the President's Obscenity Commission, who quali-

fied as an expert and author on sociology subjects generally, including topics in mass communication, family sociology, public opinion, propaganda, public attitudes and like subjects, a Dr. W. Cody Wilson, the Executive Director and Director of Research of the President's Obscenity Commission, who qualified as an expert in the field of social relationships and sexually oriented communications and acceptability thereof by persons and groups of persons, a Professor Dwight V. Swain, a Professor of Journalism at the University of Oklahoma, and Dr. Jack Haberstroh, Assistant Professor of Advertising in the Journalism Department at San Diego State College, who each qualified as experts in their respective fields. The opinions of these experts in their respective fields on the issue were that the Report with its illustrations had great social value, and four of the experts testified that in their opinion the Brochure had redeeming social value and was not obscene.

ASSIGNMENTS OF ERROR AND DISCUSSION

The appellants assert their assignments of error on the part of the District Court in the form of twenty-two separate statements of issue, some of which are overlapping and repetitious. For the purpose of convenience we rearrange, consolidate and renumber the statements of issue in continuity with the proceedings before the District Court as appears in the following discussion.

Issues 1 and 2:

Whether Title 18 United States Code Section 1461, on its face and as construed and applied, violates the free speech, due process and equal protection provisions of the First, Fifth and Sixth Amendments, and the cruel and unusual punishment provisions of the Eighth

Amendment, and the right of the People preserved by the Ninth and Tenth Amendments to the United States Constitution; and

Whether appellants were denied rights secured by the Fifth and Sixth Amendments when they were forced to stand trial under a general obscenity statute for conduct not specifically encompassed in the statute and not charged in the Indictment.

Section 1461 proscribes the knowledgeable mailing of "every obscene, lewd, lascivious, indecent, filthy or vile matter, thing, device or substance." The appellants urge that the section is unconstitutionally vague in that the words "obscene, lewd, lascivious . . ." are undefined, vague and indefinite. Accordingly, the section on its face is unconstitutional and further that the use of the words in the indictment fails to advise them clearly and distinctly of the charge which they were called upon to defend, and they were required "to go to trial with the chief issues undefined." *Russell v. U.S.*, 369 U.S. 749.

We conclude that these two assignments are without merit. The language of Section 1461 does "not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited." *Roth v. U.S.*, 354 U.S. 476, at 491-492 (1957), and *U.S. v. Reidel*, 402 U.S. 351 (1971). We subscribe to the ruling of the District Court—"An indictment framed in the language of the statute is not indefinite or vague and the use of statutory language in an indictment is sufficient. The word 'knowingly' as set forth in the indictment sufficiently charges knowledge of all the essential facts as relates to the charge against the defendants." *Hopkins v. United States*, 405 F.2d 770 (9th Cir. 1969).

Furthermore, the liberal pre-trial discovery and inspection ordered by the District Court and complied with by the government fully and completely advised the appellants of the chief contentions of the government and the materials relied upon.

Issue 3:

Whether the Indictment was returned in violation of the First and Fifth Amendments because:

a) the Grand Jury was not presented with any evidence on any of the essential elements of the offense charged;

b) Government counsel made biased and prejudiced remarks before the indicting Grand Jury.

This assignment is predicated upon the testimony of Larry Butcher, the government attorney who presented the government's position to the Grand Jury, and the appellants' version of that testimony is as follows—"Butcher advised the Grand Jury that they were to be 'guided solely by their instinctive feeling . . .'; that they were to be guided by the standards of 'moral judgment' which they had 'assimilated through the totality of their experiences' . . . also, they were 'the sole judges of the contemporary community standards of this country'; that the term 'contemporary community standards' refers to 'the average conscience of the time.'

"Butcher repeated, under oath, that he had presented no evidence on community standards, prurient interest or social value to the Grand Jury.

"Although Butcher was not sworn as a witness before the Grand Jury, he discussed the factual situation in *Ginzburg v. U.S.*, 383 U.S. 463 (1966), placing particular emphasis on a publication involved in *Ginzburg*; he discussed the extent of the sales of the book in-

volved in the *Ginzburg* case, and the advertisement involved in that case; he 'drew a parallel' between the *Ginzburg* case and the case at bar, emphasizing for the Grand Jury that appellants herein mailed out 55,000 circulars. Butcher advised the Grand Jury 'that we felt that the facts in this case were similar enough to those in the *Ginzburg* case to present [the matter to the Grand Jury] *to see if they felt there was probable cause to believe* that a Ginzburg-type situation was present in [the case at bar].' "

The appellants failed to recount that the Brochure and the Report were placed into evidence for the Grand Jury. Those materials were sufficient evidence in and of themselves for the Grand Jury to act upon. *Ginzburg, supra,* at 465. Underhill's Criminal Evidence, Fifth Edition, Section 1878.

> "[N]either the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which Grand Juries must act." *Costello v. U.S.*, 350 U.S. 359 at 362 (1956).

Johnson v. U.S., 404 F.2d 1069 (9th Cir. 1968) and *Wood v. U.S.*, 405 F.2d 423 (9th Cir. 1968), *cert. denied*, 395 U.S. 912.

The record before us is totally lacking of any evidence or showing of any kind that any member of the Grand Jury was biased or prejudiced in any degree against any of the appellants, except only a supposition as to how the members may have reacted upon a view of the Brochure and Report. The presumption of regularity which attaches to Grand Jury proceedings still abides. *Vuckson v. U.S.*, 354 F.2d 918 at 921 (9th Cir. 1966), *cert. denied*, 384 U.S. 991, and the assignment has no merit.

Issue 4:

Whether appellants were denied due process of law when the trial court refused to grant a short continuance which would have afforded appellants a more representative trial jury, after it was established that young people were systematically excluded from appellants' trial panel and the Clerk was about to correct the said exclusion.

The record discloses that the Judges of the United States District Court for the Southern District of California had theretofore adopted a duly approved plan for the refilling of the master jury wheel at specified times, pursuant to Title 28 Section 1863(b)(4). The master jury wheel in question was refilled in accordance with that plan in 1968, and the venire now under attack was drawn by lot from that wheel.

It is gleaned from the testimony of the Clerk called by the appellants that the plan requires the drawing of names of persons for prospective jury service from the registered voters of a given area. It follows, therefore, that the youngest person drawn would be in his 21st year of age and that the youngest person on the venire would be in his 24th year. In fact there were a few persons on the venire of that age.

The appellants claim that persons, 18-24 years of age, represent a distinct cognizable class or group. We assume, likened to "religion, . . . national origin, or economic status" as used in Title 28 U.S.C. Section 1862. In view of the demonstrated fact of ultimately having a most discerning trial jury, the appellants argue, in rather poor taste, that they have "been condemned and branded as felons for having mailed a brochure dealing with sex, by a jury consisting of older

persons." They argue that "Since the venire from which appellants' jury was chosen was concededly biased, i.e., young persons were systematically excluded, and since it was established that the young people were more likely to look favorably upon appellants' cause than older persons it was a denial of due process to force appellants to trial before such a jury."

While the authorities are in conflict as to whether the "young" do constitute a cognizable group or class, we will assume, without deciding, that they do. Nevertheless, the appellants have failed to show, let alone establish, a purposeful systematic exclusion of the members of that class whose names, but for such systematic exclusion would otherwise be selected for the master jury wheel in accordance with the court's plan. *Whitus v. Georgia*, 385 U.S. 545 at 551 (1966). The court in *U.S. v. Butera*, 420 F.2d 564 (1st Cir. 1970), dealt with a similar contention and recognizes that the young 21-34 years of age do constitute a cognizable class. However, the apparent underrepresentation of "the young" in juror pools was justified in view of the transience of young people and their commitments to education and military service. See *U.S. v. Parker*, 428 F.2d 488 (9th Cir. 1970) upholding the validity of the jury wheel in question.

The fact of a lower percentage of young persons on the jury than the percentage in the local population in and of itself is not a satisfactory showing of a purposeful exclusion. *Hernandez v. Texas*, 347 U.S. 475 (1954). The known propensity of younger persons, who are eligible to vote, not to register may well be the self-inflicted exclusion from jury service of which the appellants complain.

It thus becomes manifest that the motion for a continuance was without legal grounds, i.e., "to correct the said exclusion." The appellants' hope for a larger percentage of young persons on the next go around does not enjoy constitutional guaranty, nor was the District Court's declination to join in that hope an abuse of judicial discretion in denial of the continuance. *Torres v. U.S.*, 270 F.2d 252, at 254 (9th Cir. 1959). We conclude the assignment has no merit.

Issue 5:

Whether appellants were denied due process of law when the trial court refused to ask prospective jurors questions on voir dire designed to expose their biases and prejudices concerning "obscenity" and sex.

We have reviewed the transcript of the District Court's examination on the *voir dire* of the prospective jurors and conclude that the same was full, complete and immnently fair to the appellants as contemplated by Rule 24(a), Federal Rules of Criminal Procedure, and the holdings of this court as late as *U.S. v. Peterson*, et al., slip sheet opinion March 13, 1973, numbers 72-2480 and 72-2481, page 11. The appellants submitted over 130 separate questions to be placed to the jurors. The District Court asked many of the questions as submitted, many in altered and consolidated form, and declined to ask many others which were cumulative and argumentative. The handling of those questions not asked was clearly within the range of the District Court's discretion in the matter and no clear abuse of the discretion nor prejudice to the appellants has been shown. It is of interest to note that no claim of jury contamination through pre-trial publicity, local prejudice, or general attitudes, is asserted here. Accord-

ingly, the appellants' reliance upon *Silverthorne v. U.S.*, 400 F.2d 627 (9th Cir. 1968) and the race and religion cases is ill placed. The assignment is without merit.

Issues 6 and 7:

Whether the Brochure at bar is protected by the free speech and press provisions of the First Amendment to the United States Constitution, because it fairly and accurately advertises an important book, entitled to First Amendment protection; and

Whether the Government failed to produce the clear and convincing proof constitutionally required to remove presumptively protected publications from the shelter of the First Amendment.

These two designations are interwoven and can be conveniently dealt with together. The appellants argue that since the jury did not find the Report itself obscene, it is protected by the free speech and press provisions and further that since the Brochure is a fair and accurate advertisement (a pictorial story to buy) for a constitutionally protected book it is itself protected by the First Amendment. The premise is false. The jury made no finding on the charged obscenity of the Report. If there be a presumption of the protection of the Report then a query of the bona fides of the Brochure as a protected advertisement is in order. Appellants urge that the right to advertise a book is, of course, an essential link in the whole chain of communications which make freedom of the press a reality. *New York Times Co. v. Sullivan*, 376 U.S. 254 at 266. *Smith v. California*, 361 U.S. 147.

Specifically the appellants cite us U.S. v. Pellegrino 467 F.2d 41 (9th Cir. 1972). *Pellegrino* tells us that

the advertised book was entitled " 'Woman: Her Sexual Variations and Functions.' It was represented to be over two hundred pages profusely illustrated in a deluxe vinyl edition, selling only by mail order at $14.95.

"It was purportedly edited by a doctor of medicine and was described as 'a complete photo-guide of female sex response.' The advertisement was a brochure in color, folded to provide twelve pages of photographic and printed matter. It contained several explicit color photographs of female genitalia taken from the book itself.[4] These illustrations, however, are not presented as the 'feast-your-eyes-on' type of pornographic entertainment that this court encountered and described in *Miller v. U.S.*, 431 F.2d 655 (9th Cir. 1970). . . . Rather they are presented as illustrating various aspects of the book's claimed contributions to general knowledge representing the functions and characteristics of female sexual organs." *Pellegrino* ends with the conclusion that the brochure material was not obscene as a matter of law.

The footnote 4 advises us that "The brochure does not contain portrayals of explicit sexual activity between persons. Compare *United States v. Young*, 465 F.2d 1096 (9th Cir. 1972);" and others.

Unlike the situation in *Pellegrino*, the advertised Report as well as the advertising Brochure are under charge of obscenity. While we are not dealing with the charges against the Report on this appeal it is considered necessary to place it in some context with the Brochure. The Report was developed around the public domain work entitled *The Report of the Commission on Obscenity and Pornography*, an official government document printed by the United States government printing

office. The major difference between the *Commission Report* and the Report is the illustrations. The copyright page of the Report contains the following explanation concerning its pictures:

> "The Commission *Report* was not illustrated; the publishers have included the illustrative material as examples of the type of subject matter discussed and the type of material shown to persons who were part of the research projects engaged in for the Commission as basis for their *Report*."

Again, unlike the nature of the *Pellegrino* brochure, the portrayals in the Brochure here are not accompanied by any text and do not purport to be related to any written material in the report.

We narrate the Brochure as follows:

The Brochure is a single 11 by 14 inch sheet folded once. One side of the outside fold bears a color facsimile of the Report's cover with these printed words:

A GREENLEAF CLASSIC GP555.

ADULT READING $12.50

The

ALL-AMERICAN

COP-OUT

THE

ILLUSTRATED

PRESIDENTIAL

REPORT

OF THE

COMMISSION

ON

OBSCENITY

AND

PORNOGRAPHY

Introduction By The American Civil Liberties Union Dr. Eason Monroe/Executive Director for Southern California

THE COMPLETE TEXT

The other side reads in black type:

"THANKS A LOT, MR. PRESIDENT.

A monumental work of research and investigation has now become a giant of a book. All the facts, all the statistics, presented in the best possible format . . . and . . . completely illustrated in black and white and full color. Every facet of the most controversial public report ever issued is covered in detail.

This book is a MUST for the research shelves of every library, public or private, seriously concerned with full intellectual freedom and adult selection.

Millions of dollars in public funds were expended to determine the PRECISE TRUTH about eroticism in the United States today, yet every possible attempt to suppress this information was made from the very highest levels.

Even the President dismissed the facts, out of hand. The attempt to suppress this volume is an inexcusable insult directed at every adult in this country. Each individual MUST be allowed to make his own decision; the facts are inescapable. Many adults, MANY OF THEM, will do just that after reading this REPORT. In a truly free society, a book like this wouldn't even be necessary.

LIBRARY SERVICE, INC.
P. O. Box 20308
San Diego, California 92120

The second big printing of this book is now off the press and a major nationwide advertising campaign is underway. The list price is $12.50 per copy, postpaid. Please return the coupon below, with your remittance, in the enclosed self-addressed envelope. Please send ..... copies. Enclosed is my check or money order in the amount of $ ..... ($12.50 each).

I certify, by my signature below, that I am 21 years of age or over and desire the book solely for my private contemplation in the privacy of my home.

SIGNATURE .....
NAME .....
(please print)
ADDRESS .....
CITY .....STATE .....ZIP ....."

The folder opens to a full page splash of pictures portraying heterosexual and homosexual intercourse, sodomy and a variety of deviate sexual acts. Specifically, a group picture of nine persons, one male engaged in masturbation, a female masturbating two males, two couples engaged in intercourse in reverse fashion while one female participant engages in fellatio of a male; a second group picture of six persons, two males masturbating, two fellatrices practicing the act, each bearing a clear depiction of ejaculated seminal fluid on their faces; two persons with the female engaged in the act of fellatio and the male in female masturbation by hand; two separate pictures of males engaged in cunnilinction; a film strip of six frames depicting lesbian love scenes including a cunnilinguist in action and female masturbation with another's hand and a vibrator, and two frames, one depicting a woman mouthing the penis of a horse, and a second poising the same for entrance into her vagina.

The only printed words appearing on this entire interfold of pictures are:

> "In the Katzman studies (1970) for the Commission (see page 180), some 90 photographs were rated on five-point scales for 'obscene' and 'sexually stimulating' by the control group. Group activity scenes of the type here illustrated *could have been part of the 90.* (Italics supplied.) Both these group sex pictures are from the Danish magazine Porno Club No. 3, supposedly this was filmed at a 'live show' night club in Copenhagen. There are many similar clubs."

Whatever bona fide advertising attributes the *Pellegrino* brochure may have had the Brochure here has none. It stands alone, with its portrayals of explicit sexual activities between persons, among groups of persons, and a person and beast, as, simply put, hard core pornography under any definition or test. It was for the jury to determine whether the Brochure had any redeeming social value to justify its own position.

"These unusual and startling revelations are of social value (so say the appellants' experts) not only for the bedroom, but necessary as an object lesson for a public forum. The alleged story lines to buy the book (as told by the pictures in the Brochure) are the facade through which clearly shines the (appellants') true and only purpose; that is the presentation of unmistakably hard core pornography . . . the explicit sexual activity represents the 'hard core' feature of the material, while the 'pornography' and its prurient appeal is distinguished by its pervasive hallucinatory quality, its ability to produce physical concomitants of sexual excitement and emotion . . . (The Brochure's) dominant theme, and in fact, its only theme is to appeal to prurience in sex. It is hard-core pornography with a vengeance.

'It creates an abstract paradise in which the only emotion is lust and the only event orgasm and the only inhabitants animated phalluses and vulvae.' (Anthony Burgess, speaking of pornography generally . . .)

"It does, in fact, demean and pervert the sexual experience, and insults it, shamelessly, without tenderness and without understanding of its role as a concomitant of the human condition. Therefore, it does dirt on it; it insults sex and the human body as D. H. Lawrence would describe condemnable obscenity (Sex, Literature and Censorship, pp. 69, 74-79 (1953) . . ." Tyler, Judge, writing in *People v. Mature Enterprises, Inc.*, (New York Criminal Court) 3/1/73. 41 LW 2498 at 2499.

We conclude that the appellants' claim that the Brochure is inseparable from the Report is untenable and as such loses any constitutional protection as a legitimate advertisement of an asserted protected book.

The authorities on the necessity or requirement of expert opinion evidence *aliunde* as to obscenity of a charged writing or pictorial communication are in a state of flux. No such expert testimony is necessary. *Young*, supra, *Ginzburg*, supra; contra, *U.S. v. Klaw*, 350 F.2d 155 (2nd Cir. 1965) and *U.S. v. Palladino*, 41 LW 1142 (1st Cir. 2/2/73). Nevertheless, the government did present expert opinion testimony in support of the three element requirement of *Roth*, supra; at 485, and *Memoirs v. Massachusetts*, 383 U.S. 413 at 418 (1966), namely:

> "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual

matters; and (c) the material is utterly without redeeming social value."

The appellants in argument attack the qualifications of the government's experts and the evidentiary worth of their respective opinions and urge the acceptance of the extensive and voluminous (some 1115 pages in the transcript altogether) opinion testimony of their experts, in many instances flecked with personal interests and ideologies, as binding gospel. Suffice, "The initial question of whether an expert witness has sufficient competency and qualifications to testify is also within the discretion of the trial judge. *Fineberg v. United States,* 393 F.2d 417, 421 (9th Cir. 1968). Again there is no showing of an abuse by the judge, especially since he properly instructed the jury that it was to consider the expert's credentials and make its own determination as to whether to accept or reject his opinion." *U.S. v. Trice,* et al., slip sheet opinion, 9th Circuit cases 72-1317 and 72-1318, March 30, 1973.

We conclude that the assignments 6 and 7 are each without merit.

Issues 8, 9 and 10:

Whether Title 18 U.S.C. Sections 2, 371 and 1461, as construed and applied herein without proof of the essential elements of scienter, abridge the exercise of freedoms of speech and press, and other constitutional rights, in violation of the provisions of the First, Fifth, Sixth and Eighth Amendments; and

Whether the failure of the indictment herein to allege the essential element of scienter deprived defendants of their liberty without due process of law and failed to inform the defendants of the nature and cause

of the accusation made against them, contrary to the provisions of the Fifth and Sixth Amendments; and

Whether the constitutional standard for judging scienter in the prosecution under the indictment herein, charging violations of 18 U.S.C. Sections 2, 371 and 1461, required substantial proof beyond a reasonable doubt that each of the defendants was aware of the obscenity of the advertisement, and that with such knowledge mailed and conspired to mail the advertisement, all with the specific intent to appeal to a prurient interest.

In support of these collected issues the appellants argue the rationale of *Smith v. California,* 361 U.S. 147 (1950), namely: Scienter, as opposed to a statutorily imposed absolute criminal liability, is a necessary and essential element where First Amendment rights are concerned. The appellants would extend this concept to mean that it was necessary for the Grand Jury to find, the indictment to allege and the government to prove to the trial jury,

> "not only that appellant knew the contents of the materials mailed, but that he must have had a specific intent to mail what he knew and believed to be obscene literature."

The difficulty with such a premise is that it has received no judicial support to date. The exact premise and approach was rejected in *Kahm v. U.S.*, 300 F.2d 78 at 86 (5th Cir. 1962), *cert. denied,* 369 U.S. 859. We regard the following language in *U.S. v. Rubin,* 312 F. Supp. 950 (C. D. Cal. 1970) as a correct summary of the requirements of scienter in cases of charged obscenity:

> "Thus it appears that while the rule is clear that some knowledge of the contents of the films is

required in the case before us for a successful prosecution under Section 1462, the decisions do not precisely define the exact degree or amount of scienter constitutionally required. *Mishkin v. New York*, 383 U.S. 502, 510-511 (1966); and *Smith v. California*, 361 U.S. 147 (1959). What is certain, however, is that the Government must prove that the defendant knew the contents of the accused films. Yet the Government does not have the obligation of showing that the defendant knew such contents were in fact legally obscene. The leading case for this is *Rosen v. United States*, 161 U.S. 29, (1896), which involved a prosecution for mailing obscene material, the Court holding that once material is found to be obscene 'and was deposited in the mail by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States.' 161 U.S. at 41, at 438. This *Rosen* holding has been adopted in the following recent decisions: *United States v. West Coast News Co.*, 357 F.2d 855, 862 (6th Cir. 1966), rev'd on other grounds, *Aday v. United States*, 388 U.S. 447, (1967); *Kahm v. United States*, 300 F.2d 78, 86 (5th Cir. 1962), *cert. denied* 369 U.S. 859 (1962); *Schindler v. United States*, 208 F.2d 289, 290 (9th Cir. 1953) *cert. denied*, 347 U.S. 938 (1954); and *United*

States v. Luros, 260 F.Supp. 697, 702 (N.D. Iowa, 1966), rev'd on other grounds, 389 F.2d 200 (8th Cir. 1968) . . ." 312 F.Supp. at 956.

Roth, supra, reaffirmed the Supreme Court's 70 year old statement in *Rosen*, supra:

". . . Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd, and lascivious." At 491, Fn. 28.

The assignments are each without merit.

Issue 11:

Whether, in the light of the record which is barren of proof that the defendants, or any of them,

a) had knowledge of the alleged "obscenity" or of the "nature and character" or the "contents" of the Brochure specified in the indictment,

b) mailed or caused to mail the Brochure as charged in the indictment, or

c) conspired to mail the advertisement specified in the indictment or had the constitutionally requisite scienter in such alleged conspiracy, the judgments of conviction herein abridge defendants' exercise of freedoms of speech and press, deprive defendants of their liberty without due process of law, deny defendants the equal protection of the laws and the guarantees of a fair trial and hearing, and constitute cruel and unusual punishment, in violation of the provisions of the First, Fifth, Sixth and Eighth Amendments.

The assignment in each of its parts has no merit.

The trial record, rather than being barren, is fruitful in containing an abundance of clear and convincing

evidence directly placing all of the appellants in the play, each acting a separate role, well knowing the contents and substance of the material they in concert caused to be mailed. The government's evidence showed Hamling as the director and producer, Kemp, a writer, and the others the property managers and researchers for the production.

The jury believed the evidence, and the risk referred to by Mr. Justice Holmes in *U.S. v. Wurzbach*, 280 U.S. 396, at 399 (1930), is the appellants' sufferance.

Issue 12:

Whether the wholesale exclusion of constitutionally relevant evidence proffered by defendants deprived the defendants of a fair hearing and fair trial, an opportunty to be heard and to defend aganst the charges, with resultant deprivation of defendants' liberty, contrary to the free speech and press, due process and fair trial provisions of the First, Fifth and Sixth Amendments.

The appellants offered in evidence various written and pictorial matters and one reel of motion picture film, which the appellants claim were comparables to portrayals in the charged Brochure, in order to show non-obscenity of the charged material. It is asserted some of the proffered material was relevant because they had received second-class mailing privileges, others because they had been the subject of litigation and had been found to be "constitutionally protected," and others because they were currently available on newsstands.

We have perused the record and viewed the rejected pieces and conclude the District Court was right in rejecting the proffered exhibits.

The proffered materials, in and of themselves, were devoid of relevancy. One portrayal of female genitalia is quite likely to be comparable to another, and one portrayal of the act of fellatio is quite likely to be comparable to another, and so on. Nevertheless, none of the proffered pieces, speaking for themselves, tell the jury about the nature or context of their respective communications as viewed under the three-prong Roth-Memoirs test of obscenity. Nor was any offer of proof in that regard made. Accordingly, the jury had no basis to determine comparability of a given proffered portrayal with any portrayal in the Brochure as it was communicated under the facts of this case, nor for the weight to be given to such comparability, if any there be, *Womack v. U.S.*, 294 F.2d 204 (D.C. Cir. 1961), *cert. denied*, 365 U.S. 859 (1961); *U.S. v. Jacobs*, 433 F.2d 932 (9th Cir. 1970).

For an example, we mention the Pellegrino portrayals of female genitalia being stimulated with a vibrator. These pictures were judicially held to be non-obscene, yet in and of themselves, they are most likely pure hard core pornography. They become non-obscene when communicated in the context of a pictorial adjunct to educational text. It was through this measure and consideration the pictures acquired some social value. The proffered pieces had no logical or reasonable social value attributed to them for the jury to consider in determining the obscenity or non-obscenity of the charged Brochure.

A second-class mailing privilege is not a license to mail obscene material. *Hannegan v. Esquire*, 327 U.S. 146 (1946). Just because pictures, which might be look-alikes to the pictures in the Brochure, are for sale

and purchased in book stores around the country does not make them witnesses of virtue. *U.S. v. Manarite*, 448 F.2d 583 (2nd Cir. 1971), *cert. denied*, 404 U.S. 947 (1971).

The District Court rejected the proffered pieces primarily because "they tend to confuse the jury." The admissibility of such evidence is within the discretion of the trial court. *Schindler v. U.S.*, 208 F.2d 289 (9th Cir. 1953), *cert. denied*, 347 U.S. 938 (1953); *Jacobs*, supra.

Any abuse to appellants' defense in the rejection of the confusing exhibits was removed and cured by the District Court's offer to entertain expert testimony with respect to the elements to be shown for the advice of the jury. We conclude the assignment lacks merit.

Issues 13 and 14:

Whether the trial court erred in permitting the Government to introduce evidence that the Brochure appealed to the prurient interest of sexually deviant groups, and in instructing the jury that it could convict if it found that the Brochure appealed to the prurient interest of undefined sexually deviant groups, although neither the statute nor the indictment fairly advised appellants that they were so charged, and the record was barren of evidence that the Brochure was designed for and primarily distributed to sexually deviant groups; and

Whether the appellants were unfairly convicted in violation of due process of law and in violation of Rule 7(f) of the Federal Rules of Criminal Procedure, when the court instructed the jury that it could measure the prurient appeal of the Brochure by its impact on undefined sexually deviant groups, after the Govern-

ment filed a Bill of Particulars stating that its claim was that the Brochure appealed to the prurient interest of the average person.

These two issues are interlocked and as such should be discussed together. The appellants are correct. They were charged with dealing in obscene materials which appealed to the prurient interests of the *average person.* The government so stated in its pre-trial answer to the appellants' request for particulars. The cause was tried on that premise, and when the District Court's instructions are taken as a whole we conclude the jury was so instructed and the assignments are each without merit.

Dr. Anchell did give opinion testimony over the objection of the appellants that the material appealed to the prurient interests of homosexuals, group sexual activists and persons in masochism, pedophilia and zoophilia. However, this testimony was directed to the charged report, and the sole direct testimony concerning the Brochure was that it had an appeal to "pruriency."

The District Court's instructions made it abundantly clear to the jury that in order to convict any of the appellants they must find the coalescence of the Roth-Memoirs three elements, namely:

> "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex;
>
> (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and
>
> (c) the material is utterly without redeeming social value."

The jury was further advised:

"Now, what is prurience? . . . Prurient interest is a shameful or morbid interest in sex or nudity, and you must measure this appeal *by the average or ordinary adult or by a clearly defined deviant group, as will be explained elsewhere.* (Emphasis added) . . .

"In determining whether material appeals to a prurient interest, you should consider not only what is portrayed, but the way it is portrayed, and the way it is used, or the way it is described. The materials here involved must be measured by its appeal to *the average adult* . . . determined by the synthesis of the entire community, including persons of all sexes, religions, . . . ages and et cetera . . . but it must be remembered that the materials must be measured *by such average adult* and not by young persons or those persons highly susceptible thereto."

When the foregoing pertinent parts of the instructions are considered together it is manifest that the District Court considered that some of the portrayals in the Brochure might be found to have a prurient appeal to homosexuals, i.e., male practicing fellatio, and not to the average person. Hence, we believe, to avoid confusion the jury was advised, that

"the prurient interest requirement may, also, be assessed in terms of sexual interests of the intended or probable recipient group . . (which) must be a clearly defined sexually deviant group . . . I suppose one clearly defined would be homosexuals.

"There are depicted throughout the materials under consideration, various sexual activities that

may or may not be found to be deviant, that may have prurient appeal, depending upon the particular sexual interest of the viewer, whether normal or deviant. . . .

"Consequently, if you find that some of the material appeals to the prurient interest of the average person, and some of the material appeals to the prurient interest of a deviant sexual group, that fact would not preclude your finding that the dominant theme of the material taken as a whole is, generally speaking, one of an appeal to the prurient interest, as has been previously defined in the broad sense."

The instructions on the prurient appeal to deviant groups was cautionary and did not compromise nor mitigate the repeated admonition of the District Court that the jury must find the *dominant theme* of the material to be one of prurient *appeal to the average person*. While we do not hold that the opinion testimony of Dr. Anchell constituted a variance of proof under the government's answer we will assume that it did. However, such variance was in no wise a surprise or prejudice to the defendants as their own expert opinion testimony interwove and covered the same field completely.

Issue 15:

Whether the trial court erred in instructing the jury that the Brochure could be condemned as obscene, even if it did not meet the three-pronged test of obscenity, if the jury found "pandering,";

a) where pandering is not encompassed in 18 U.S.C. Section 1461, and

b) where pandering is encompassed in other legislation enacted by Congress, 39 U.S.C. Section 3008, and

c) where pandering was not charged in the indictment, and

d) where there was no evidence in the record of pandering.

The premise of this designation is vitiated with a perusal of that part of the District Court's instructions dealing with the evidentiary value of the practice of pandering, if there was such, in considering whether the charge of obscenity was sustained. The jury was advised:

"Having covered the three elements of obscenity, there is one additional matter that you may consider and that is the matter of pandering. You must make the decision whether the materials are obscene under the test I have given you. In making this determination you are not limited to the materials themselves. In addition, you may consider the setting in which they were presented. Examples of what you may consider in this regard are such things as: Manner of distribution, circumstances of production, sale, and advertising. The editorial intent is also relevant. What you are determining here is whether materials were produced and sold as stock in trade of the business of pandering. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer . . .

"The question of obscenity is to be answered by application of the basic test recited earlier, but if you find this to be a close case under that test, then you may consider the evidence of pandering to assist you in your decision. Such evidence is pertinent to all three elements of the basic test of obscenity.

"The circumstances of presentation and dissemination of material are especially relevant to a determination of whether the social importance claimed for the material is pretense or reality, whether it was the basis upon which it was traded in the market place or a spurious claim for litigation purposes. Where the distributors' sole emphasis is on the sexually provocative aspects of the publications, that fact may be decisive in the determination of obscenity . . .

"In summary, evidence of pandering simply is useful in applying the basic obscenity test where an exploitation of interest in titillation by pornography is shown with respect to the material lending itself to such exploitation through pervasive treatment or description of sexual matters. Such evidence may support the determination that the material is obscene, even though, in other context, the material would escape such condemnation."

We must keep in mind that the jury was being instructed in consideration of the charges against both the Report and the Brochure. At that stage the Brochure was being considered as (a) a document charged as obscene in and of itself and (b) an advertisement of the Report, an alleged obscene book.

We conclude the instruction was correct as applied to the Brochure in either classification. This court in considering the practice of pandering as it applied to the *Pellegrino* brochure stated:

"We cannot say, however, that the question of pandering is wholly irrelevant. Pandering advertising may well forfeit an otherwise available claim of redeeming social value. Further it may cast light on the question whether the dominant theme of the

advertising brochure itself is an appeal to a prurient interest in sex."

Issue 16:

Whether the refusal of the trial court to give defendants' proposed instructions on scienter, and the trial court's instructions on scienter, abridged defendants' exercise of freedoms of speech and press, and other constitutional rights, contrary to the First, Fifth and Sixth Amendments.

A perusal of the appellants' proposed instructions shows them to be partisan presentation of the legal issues raised in their arguments and position dealt with under Issues 8, 9 and 10 and were properly rejected. The District Court's instructions to the jury on scienter were in conformity with the legal requirements of scienter outlined above. We see no merit to the assignment.

Issue 17:

Whether the trial court committed clear, and reversible, error when it denied appellants the opportunity to make objections to the court's jury charge out of the presence of the jury.

The appellants urge that they were entitled as of right under Rule 30, Federal Rules of Criminal Procedure, to make and enter their objections to the jury charge not only out of the hearing, but also "out of the presence of the jury" and the denial thereof was clear reversible error.

Such appears to be the rule of *Hall v. U.S.*, 378 F. 2d 349 (10th Cir. 1967); however, the qustion raised by the assignment is one of first instance and undecided in this circuit. We believe, in order to properly resolve that question, it is necessary to consider the pertinent provisions of Rule 30 in four aspects or parts.

These are:

1) At the close of the evidence or . . . earlier time . . . as the court . . . directs, any party may file written requests . . . (requested instructions).

2) The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, . . . (settlement of instructions conference).

3) No party may assign as an error any portion of the charge or omission therefrom unless he objects thereto before the jury retires . . . (record of objections).

4) Opportunity shall be given to make the objections out of the hearing of the jury and, on request of any party, *out of the presence of the jury.* (After instructing conference.)

While hindsight is very good at telling us that compliance with the rule would have been the right thing to do, it does not answer the question in this case. The rule of *Hall*, supra, would declare the District Court's denial of appellants' request an automatic reversible error, even though the after instructing conference was in fact a mere perfunctory saving of record. Other circuits dealing with the question have adopted one of two alternate approaches:

a) The court's refusal to comply with the fourth aspect of Rule 30 "will demand reversal 'if there is reasonable basis for concluding that the colloquy held in the presence of the jury was prejudicial.'" *U.S. v. Fernandez*, 456 F.2d 638 at 644 (2nd Cir. 1972). This rule appears to abide also in the 5th Circuit.

b) The court's failure to comply with the fourth aspect of Rule 30 is reversible "error unless it be demonstrated on an examination of the whole record that the denial of the right did not prejudice" a defendant's case. *U.S. v. Schartner*, 426 F.2d 470 at 479-80 (3rd

Cir. 1970). This rule also appears to be the rule in the 4th Circuit.

We believe the automatic reversal rule of *Hall*, supra, is too uncompromising in its harshness and decline to adopt the same.

It is manifest that the rule of *Fernandez*, supra, places a burden upon a defendant in a criminal case that he may not be able to carry.

Occasionally procedural errors do occur during the course of a given trial and yet are of no consequence whatsoever to a fair and just outcome. The fair and just outcome and ultimate justice is fostered by a rule which treats inconsequential procedural errors as such, and still provides for relief from those procedural errors that do result in a party's prejudice and an unjust outcome.

We believe that the principle announced in *Schartner* leaves more room for looking at the facts and the circumstances leading up to and attending the after instructing conference for a realistic basis of concluding that such conference was not prejudicial and we subscribe to the rule of *Schartner*.

Viewing the whole record in this case it becomes manifestly clear that at the time the District Court invited counsel to the bench it was the intention of the court, and should have been on the part of all counsel as well, that the after instructing conference at the bench was to be a perfunctory record saving session.

In conformity with the settling of instruction conference phase of Rule 30 the District Court and counsel held an extensive and exhaustive conference by way of reviewing the requests and settling the instructions to be given by the District Court and noting counsel's objec-

tions thereto. We burden this opinion no more than to recite the closing phases of that conference:

> "MR. KATZ: (for some of the appellants) May I just say one thing, your Honor. I know that the Court has in the past assumed that we join in all objections. Since Rule 30 requires that at the close of the instructions we make our objections, I would like the record to show that we are joining Mr. Fleishman in the objections and we assume that at the conclusion of the Court's instructions, *the Court will incorporate all objections made at this time as though the conference had been held after the instructions were given.*
> THE COURT: That is correct.
> MR. KATZ: Thank you.
> THE COURT: All right.
> MR. FLEISHMAN: (for the other appellants) That applies also with regard to the conspiracy instructions which I did not apply myself to specifically. I believe the conspiracy instructions given by the Court are violative of the constitutional rights of the defendants and that our instructions on conspiracy, particularly as they apply to the First Amendment, to the expression of books and magazines, all of which were excluded by the Court's proposed instructions on conspiracy—we object to those and we object to the failure of the Court to give our instructions in that regard.
> THE COURT: All right."

and the opening of the after instructions conference at the bench:

> "THE COURT: . . . Now, for the purposes of the record, Mr. Fleishman, your objections—all

of your objections to the instructions have heretofore been noted and I said that I would give note to the fact before I concluded the instructions.

Do you have any comments to make?

MR. FLEISHMAN: Yes, your Honor.

I think the matter is at this stage very sensitive with the Jury here. I would suggest it wouldn't take long, perhaps not more than four or five minutes, but I would urge the Court to ask the Jury to go into the jury room while we present it. I gather that sometimes words drift over to the Jury at this stage of the proceedings.

THE COURT: You have made all the objections suitable that I can think of. I want to send this Jury out. If you want to make a statement, make a statement.

MR. FLEISHMAN: I would ask the Court if it is convenient, that they be excused for a few moments.

THE COURT: No.

MR. FLEISHMAN: First of all, with regard to the social value, Your Honor referred to the book and magazine rather than the book and advertisement. I think that has to be corrected. You said book and magazine, the social value test applies. I know it was a mistake in reading. At least, that is what I heard. I think that ought to be corrected.

THE COURT: All right."

Thereafter, Mr. Fleishman continued for ten pages of transcribed reiteration of the appellants' position taken at the settlement of instructions conference. Mr. Katz had only this to say:

"Now, just so it is clear, my clients joined in the objections Mr. Fleishman has made and all of the objections made at the previous conference are incorporated . . ."

Whatever reaction the jury might have had from seeing or hearing any part of the bench conference was the result of counsels' own doings and unnecessary for the preservation of appellants' record of objections. We conclude there was no prejudice to any of the defendants as a result of the procedural error on the part of the District Court to literally comply with Rule 30.

Following the bench sessions, the District Court called the jury's attention to and corrected the slip of the tongue reference to a "magazine."

Issue 18:

Whether, in the light of all the foregoing, the trial court erred in denying defendants' post-trial motions for judgment of acquittal, in arrest of judgment, and for a new trial.

Since we have dealt with all of the grounds for each of the foregoing motions adversely to the appellants, the above assignment is meritless.

The judgment of convictions is affirmed.

Dated this 5th day of June, 1973.

.....

United States Circuit Judge

.....

United States Circuit Judge

/s/ William G. East

United States District Judge

The jury was further advised:

"Now, what is prurience? . . . Prurient interest is a shameful or morbid interest in sex or nudity, and you must measure this appeal *by the average or ordinary adult or by a clearly defined deviant group, as will be explained elsewhere.* (Emphasis added) . . .

"In determining whether material appeals to a prurient interest, you should consider not only what is portrayed, but the way it is portrayed, and the way it is used, or the way it is described. The materials here involved must be measured by its appeal to *the average adult* . . . determined by the synthesis of the entire community, including persons of all sexes, religions, . . . ages and et cetera . . . but it must be remembered that the materials must be measured *by such average adult* and not by young persons or those persons highly susceptible thereto."

When the foregoing pertinent parts of the instructions are considered together it is manifest that the District Court considered that some of the portrayals in the Brochure might be found to have a prurient appeal to homosexuals, i.e., male practicing fellatio, and not to the average person. Hence, we believe, to avoid confusion the jury was advised, that

"the prurient interest requirement may, also, be assessed in terms of sexual interests of the intended or probable recipient group . . (which) must be a clearly defined sexually deviant group . . . I suppose one clearly defined would be homosexuals.

"There are depicted throughout the materials under consideration, various sexual activities that

"[W]e see no possible reason to remand, especially as the Supreme Court has just addressed itself to the construction and adequacy of the federal statute involved. See *United States v. 12 200-Ft. Reels of Super 8mm. Film*, supra, 41 U.S.L.W. at 4963, n. 7."

Accordingly, the petition for rehearing and the suggestion for a rehearing en banc will be submitted to the full court; and the present stay of mandate is continued until further order.

Dated this 20th day of August, 1973.

/s/ Stanley N. Barnes
United States Circuit Judge

/s/ William G. East
United States District Judge

APPENDIX C.

Order of the Court of Appeals Denying Petition for Rehearing.

Filed: August 23, 1973, Clerk U.S. Court of Appeals.

In the United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. William L. Hamling, et al., Defendants-Appellants. Nos. 72-1892, 72-1893, 72-1894, 72-1895, 72-1896, 72-1897.

ORDER

Before: BARNES, Circuit Judge, and
EAST,* District Judge.

The majority of the panel hearing this matter has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The present stay of mandate is ordered terminated, and the mandate is ordered to be issued in due course.

Dated this 22nd day of August, 1973.

/s/ Stanley N. Barnes
United States Circuit Judge

/s/ William G. East
United States District Judge

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX D.

Order Staying Issuance of Mandate.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. William L. Hamling, Earl Kemp, Shirley R. Wright, Reed Enterprises, Inc., David L. Thomas, Library Service, Inc., Defendants-Appellants. Nos. 72-1892, 72-1893, 72-1894, 72-1895, 72-1896, 72-1897.

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Stanley Fleishman and Sam Rosenwein, counsel for the defendants-appellants, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the appellants herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before September 24, 1973.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

Dated: Los Angeles, Calif. Aug. 28, 1973.

/s/ Stanley N. Barnes
United States Circuit Judge.

APPENDIX E.

Constitutional and Statutory Provisions.

1. The pertinent provisions of the First Amendment are:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

2. The pertinent provisions of the Fifth Amendment are:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . ."

3. The provisions of the Sixth Amendment are:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

4. The provisions of the Eighth Amendment are:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

5. The provisions of Title 18 U.S.C., §2, are:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." (June 25, 1948, c. 645, 62 Stat. 684; Oct. 31, 1951, c. 655, §17b, 65 Stat. 717.)

6. The provisions of Title 18 U.S.C., §371, are:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." (June 25, 1948, c. 645, 62 Stat. 701.)

7. The pertinent provisions of Title 18 U.S.C., §1461, are:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—. . .

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made . . .

"Is declared to be nonmailable matter and shall

not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter." (June 25, 1948, c. 645, 62 Stat. 768; June 28, 1955, c. 190, §§1, 2, 69 Stat. 183; Aug. 28, 1958, Pub.L. 85-796, §1, 72 Stat. 962.)

8. The provisions of Rule 30 of the Federal Rules of Criminal Procedure are:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission

therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury." (As amended Feb. 28, 1966, eff. July 1, 1966.)

APPENDIX F.

Resume of Testimony and Summary of Comparable Evidence Excluded by the Trial Court.

(a) The petitioners called, on their behalf, witness W. Cody Wilson, who served as Executive Director for the Commission on Obscenity and Pornography [R.T. 3186-3208]. During the direct examination of the witness, petitioners' counsel asked the witness to verify that certain pictures containing sexual depictions had been used by various researchers retained by the Commission [R.T. 3380-3382]. The court stated: "Well, as far as the Court is concerned, these pictures are not going to be admitted, nor are they going to be marked." [R.T. 3382]. The witness Wilson was asked whether he had found any explicit sexual material, as defined by the Commission, available in the San Diego area [R.T. 3575-3576]. The witness replied that all such material was available [R.T. 3576]. The witness also testified that essentially the same kinds of material were found throughout the United States [R.T. 3577]. The witness was then shown the magazine "Animal Love" and a magazine "The Advanced Handbook of Swingers" [Defts. Exs. QQ, RR] and was asked whether the magazines had a reasonable degree of acceptance in the Nation as a whole. He stated that they had such acceptance, based on scientific studies on his own personal conversations with people and his own knowledge. The witness was also shown three other exhibits [Defts. Exs. BC, BD, BE] and stated that they, too, on the basis of scientific studies and his own personal knowledge, have a reasonable degree of acceptance in the Nation as a whole [R.T. 3578]. The exhibits were offered into evidence, and the trial court stated: "I see no need for it to come into evidence, Mr. Katz. They

may be marked for identification, but there is no need for them to come into evidence." [R.T. 3579].

(b) The petitioners offered the witness Virginia Carlson [R.T. 3922], a student at San Diego State University. Her special major included journalism, psychology and speech communication [R.T. 3923]. Under the supervision of Dr. Haberstroh, Assistant Professor of Advertising in the Journalism Department at San Diego State, who had previously testified [R.T. 3941], the witness conducted a survey of residents of San Diego to determine their reaction to *The Illustrated Report* and the advertising brochure [R.T. 3926]. The witness described the investigation she conducted in detail and the prepared questionnaire that was used, all of which petitioners offered to prove demonstrated that a majority of the residents were in favor of people reading the book, that they thought the book should be read, and that a substantial majority said the advertisement should also be available to the public in general [R.T. 3932]. The court stated that because a national standard was involved, the standards of San Diego were not relevant and the evidence was inadmissible [R.T. 3933], although the counsel for petitioners stated that additional experts were going to be brought in to talk about standards throughout the country and that material with respect to one area of the country was clearly relevant in finally determining the question of national community standards [R.T. 3941]. It was urged upon the court that the testimony supported a national survey that had actually been made by the Commission

and that the testimony bore upon the question of lack of prurient interest appeal [R.T. 3934-3947]. The trial court declined to permit the testimony of the witness or to admit either the questionnaire or the results of the study [Defts. Exs. BH, BI; R.T. 3937-3938].

(c) Finally, after the petitioners rested, the court stated that it was now prepared to listen to argument "on the introduction of evidentiary matters, physical evidentiary matters" [R.T. 4364]. Petitioners offered Exhibit A, the film which had been held to be constitutionally protected in *Pinkus v. Pitchess*, 429 F.2d 416 (9th Cir. 1970), aff'd. 400 U.S. 922, 91 S.Ct. 185. The petitioners offered two magazines entitled, respectively, "Togetherness" and "Flesh and Fantasy" which had been found to be not obscene by the United States Supreme Court [Defts. Exs. A-1, A-2; R.T. 4365]. See, *Burgin v. South Carolina*, 92 S.Ct. 46 (1971), rvsg. 178 S.E.2d 325. The court stated, "They may be marked. I am not going to permit them into evidence, Mr. Fleishman, but they may be marked. Nor am I going to permit the film into evidence."

The petitioners offered the magazine entitled "Nude Living No. 63" [Defts. Ex. II; R.T. 4368], the magazine which had second-class mailing privileges and, it was urged, was comparable material which the jury should see. The court denied admission of the evidence [R.T. 4369].

Petitioners offered Exhibits QQ and RR, the magazines entitled "Animal Love" and "The Advance Handbook of Swingers" [R.T. 4370], upon which

there had been testimony from the prosecution witness Getline that similar material was found in adult bookstores in his informal survey and the witness W. Cody Wilson had stated that illustrations contained in the magazine were contained in material in adult bookstores through the country. The material was offered on the question of customary standards in the light of acceptance by the community [R.T. 4370-4372]. The motion to admit the evidence was denied [R.T. 4372].

The petitioners offered publications entitled "Deviant Sexual Behavior", "The Advanced Handbook of Oral Sex" and "Screw, The World's Greatest Newspaper" [Defts. Ex. BC; R.T. 4372-4373]. Admission of the evidence was denied [R.T. 4373].

Petitioners offered into evidence three publications entitled "Couples", "Whipsters" and "Questions and Answers" [Defts. Exs. P, O, R; R.T. 4374].

The petitioners offered Exhibits JJ-1 through JJ-11, which were sex educational pamphlets, the covers of four of the said pamphlets having appeared in *The Illustrated Report* [R.T. 4374]. The motion to introduce the material was denied [R.T. 4376].

Petitioners offered Exhibits HH and GG, which were certain issues of "Playboy", the cover of one being identical to a picture in *The Illustrated Report,* and about which both prosecution and defense witnesses had testified on the issue of the value of using more than one picture to illustrate a point. The motion to admit the evidence was denied [R.T. 4377].

Petitioners again tendered Exhibits BG, BH and BI, which were the chart, the questionnaire and the results of the study conducted by defense witness Virginia Carlson [R.T. 4377]. The offer was rejected [R.T. 4377].

Petitioners offered Exhibit AA, the Kerner Report, and Exhibit Z, the Walker Report [R.T. 4381-4382], and they were denied [R.T. 4382].

Petitioners offered articles written by the witness W. Cody Wilson [Defts. Exs. TT-1 through TT-5; R.T. 4385], all of which were rejected [R.T. 4385].

Petitioners offered various still photographs, some fifteen different books, and a deck of playing cards, as material which a Dr. James Howard had used in his study for the Commission [R.T. 4386, 4392-4393; Defts. Ex. BJ], all of which was rejected [R.T. 4393].

APPENDIX G.

Portion of Hearings on September 25, 1969, Before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, Ninty-First Congress, on H.R. 5171, H.R. 11009, H.R. 11031, H.R. 11032, and Related Measures, Serial No. 21.

* * *

"MR. KASTENMEIER. Would Federal obscenity legislation have to be uniform throughout the country or could it make allowances for differences in, say, the prevailing morality in various regions of the country?"

"MR. REHNQUIST. One's first instinct, I think, is to say that perhaps some allowance ought to be made for the differing concepts of morality in different regions. Yet, when you are talking about a Federal statute that is enacted to cover all 50 States, I think you have to pretty well come to the conclusion as far as the Federal statute is concerned, it has to be a nationwide standard."

"MR. KASTENMEIER. To the extent it does have to be uniform, does this not introduce undesirable rigidity in terms of what might be termed Federal bureaucratic control preempting the exercise of State police powers in this field?"

"MR. REHNQUIST. As I understand, Mr. Chairman, there is no effort here to preempt State regulation in these areas."

"It may be that the constitutional doctrine enunciated by the Supreme Court will permit the States to vary the standards that they impose State by State. I really think the Federal Government has little choice. If it does it at all, I think it has to be on a national basis." (Hearings, 37-38)

* * *

"MR. HUTCHINSON. . . .

"Remembering the testimony of Congressman Bennett this morning and his reference to what he called variable concepts of obscenity, I am curious to know what the meaning of the word 'community' might be . . . in H. R. 11031. . . . My question specifically is: Is that a national community or is that a community in the traditional sense, or would it be a State, or what?"

"MR. REHNQUIST. I don't deny that it is a problem, Congressman Hutchinson. I think that the uniformity is by no means monolithic, though.

"I think States, to the extent that the Constitution permits them, are certainly not required to adhere to a national standard in their own dealings with literature for minors. But I think for the Federal Government to try to adopt in its statute a State-by-State or community-by-community standard would be very unworkable."

"MR. HUTCHINSON. Perhaps we get down to what I understood to be the thrust of Senator Dirksen's approach to this matter, in which he advocated, as I understand it, that the question of what is obscene be made a factual determination for the jury. Thus a jury in New York might look at a thing differently than a jury in Alaska."

"MR. REHNQUIST. I think that the jury is always representative of the local community. . . . I feel the juries are going to necessarily represent a local community standard despite the judge's charge, telling them that it is in effect the country as a whole that they have to consider."

"MR. HUTCHINSON. Pardon me. Maybe my thought was formulated before the last phrase of yours.

You said you thought it would be the duty of the judge to instruct the jury that in determining what is offensive to prevailing standards it should take into account the national community?"

"MR. REHNQUIST. Yes, I do."

"MR. HUTCHINSON. How can it do that? It has its own concept of what is right and wrong."

"MR. REHNQUIST. There could be, and has been in some of these obscenity cases, expert testimony as to what is or is not offensive, patently offensive. I think it has been couched in terms of the national community." (*Hearings*, 46-47.)

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-507

WILLIAM L. HAMLING, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that their convictions must be reversed because they were tried under the obscenity standards applicable at the time of trial, which was before this Court decided *Miller* v. *California* and the related obscenity cases. They also raise numerous other claims of error, including whether scienter was established, whether the trial court excluded relevant evidence and whether the jury instructions were proper.

Following a jury trial in the United States District Court for the Southern District of California, petitioners were convicted on twelve counts of mailing and conspiring to mail an obscene brochure, in violation of

527-975—73——1

18 U.S.C. 2, 371 and 1461.[1] Petitioner Hamling was sentenced to imprisonment for four years and was fined $32,000; petitioner Kemp was sentenced to imprisonment for three years and one day; petitioners Wright and Thomas received suspended sentences of one and one-half years, and were placed on probation for five years; petitioners Reed Enterprises, Inc., and Library Service, Inc., were fined $43,000 and $12,000 respectively. The court of appeals affirmed (Pet. App. A). After reconsidering a petition for rehearing in light of *Miller* v. *California*, No. 70–73, decided June 21, 1973, and companion cases,[2] the court denied rehearing (Pet. App. B and C).

The evidence summarized by the court below showed that approximately 55,000 brochures[3] advertising the Illustrated Report were mailed to postal patrons by a direct mail advertising service. The service was employed by an unindicted co-conspirator which was paid by petitioner Hamling, acting for petitioner Reed Enterprises. The mailing and the brochure identified petitioner Library Service as the mailing party, and stated that the Illustrated Report could be ordered from Library Service (Pet. App. 5). Petitioners

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[1] Petitioners were also charged in several counts with mailing and conspiring to mail an allegedly obscene book entitled "The Illustrated Presidential Report of the Commission on Obscenity and Pornography" (hereinafter, "Illustrated Report"), but the jury did not reach a verdict on these counts.

[2] *Paris Adult Theatre I* v. *Slaton*, No. 71–1051; *United States* v. *Orito*, No. 70–60; *United States* v. *12 200-Ft. Reels of Super 8mm. Film*, No. 70–2; *Kaplan* v. *California*, No. 71–1422.

[3] For a detailed description of the brochure, which was received in evidence, see the opinion below (Pet. App. 16–19). A copy is being lodged with the Court.

Kemp and Wright signed documents on behalf of Library Service for the post office box to which orders were to be sent (Pet. App. 6). Petitioner Thomas rented the postage meter installed at Library Service for use in mailing the Illustrated Report to those ordering it (Pet. App. 6). The court below concluded that the record evidence established that "[t]he individual appellants were responsible staff, policy decision making and operating members of the corporate appellants as distinguished from mere 'figurehead' officers and directors of their respective corporations" (Pet. App. 6).[4]

While urging that this Court's decisions in *Miller* v. *California*, No. 70–73, decided June 21, 1973, and its companion cases are "prospective" only (Pet. 26, 29), petitioners nonetheless argue that these decisions rendered the standards of *Roth* v. *United States*, 354 U.S. 476, and *Memoirs* v. *Massachusetts*, 383 U.S. 413, under which they were convicted, unconstitutional.[5] This contention is without substance. At no point did this Court in its obscenity decisions indicate that its clarification and modification of the *Roth* and *Memoirs* standards were required because those standards were unconstitutional. See *United States* v. *Thevis*, 484 F.2d 1149 (C.A. 5); *United States* v. *One Reel of*

[4] The court also found that: "The government's evidence showed Hamling as the director and producer, Kemp, a writer, and the others the property managers and researchers for the production" (Pet. App. 25).

[5] In effect, therefore, they contend that *Miller* precludes any obscenity prosecutions for transactions occurring before June 21, 1973.

Film, 481 F.2d 206 (C.A. 1). Rather, it is clear that the Court believed that *Memoirs* imposed greater burdens on the regulation of pornography than were constitutionally necessary. It was, moreover, concerned with the absence, since *Roth*, of a single majority view defining proper standards for testing obscenity. *Miller*, *supra*, slip op. at 7–8, 14–15, citing as an example, *Redrup* v. *New York*, 386 U.S. 767. By setting out definite standards in a majority opinion, the Court sought to strengthen the judicial power to regulate pornography by giving lower courts more positive guidance in judging obscene materials. This, of course, does not mean that the standards set out in *Roth* or *Memoirs* were unconstitutionally vague or indefinite, and this was not the holding in *Miller*.

Furthermore, the remand action taken by this Court in cases subsequent to Miller, supra, ~~sequent cases~~ such as *Groner* v. *United States*, No. 72-1731, vacated and remanded, October 23, 1973, clearly indicates that convictions under the *Memoirs* standards are not unconstitutional. If they were, the Court would have reversed or merely vacated those convictions. Instead, the Court vacated the decisions and remanded the cases to the respective courts of appeals with directions to reconsider the cases in light of *Miller* and its companion cases.*

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* In a letter to the clerk dated October 24, 1973, petitioners have called this Court's attention to *United States* v. *Henson*, No. 73-2063 (C.A. 9, October 5, 1973), which remanded an obscenity case to the district court for reconsideration in light of *Miller*. We believe this course of action was inconsistent with *Miller* and other circuit court cases which have considered the

Under this procedure, defendants convicted under the old standards have the benefit of an independent appellate constitutional judgment under the modified standards. See *Jacobellis* v. *Ohio*, 378 U.S. 184, 188. Here the court below considered petitioners' convictions in light of *Miller* (Pet. App. B), and determined that no rehearing of its previous affirmance was necessary because the evidence was abundantly sufficient to meet, and the district court's jury instructions in full compliance with, the essential elements of the *Roth-Memoirs'* standards. "*A fortiori* the more relaxed standards announced recently by the Supreme Court [in *Miller*] were met." *United States* v. *One Reel of Film, supra*, 481 F.2d at 209. This decision was correct; the brochure involved here is obscene under any standard (Pet. App. 28).

The trial court's charge, which conformed to the *Roth-Memoirs standard* [1] (Pet. App. 28), imposed a substantially more stringent burden on the prosecution in proving obscenity than the guidelines laid down in *Miller*,

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issue and, after *Miller*, upheld convictions obtained under the *Roth-Memoirs* standard. *E.g.*, *United States* v. *Millican*, No. 73-1734 (C.A. 5, October 18, 1873); *Cote* v. *United States*, No. 72-2417 (C.A. 5, October 11, 1973); *Brown* v. *United States*, No. 71-1759 (C.A. 4, September 18, 1973); *United States* v. *Thevis*, 484 F. 2d 1149 (C.A. 5); *United States* v. *Miller*, 482 F. 2d 1379 (C.A. 9); *United States* v. *Sians*, 481 F. 2d 1406 (C.A. 7). We are petitioning the Ninth Circuit Court of Appeals for rehearing in *Henson*.

[1] "* * * three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Memoirs, supra*, 383 U.S. at 418.

supra.[8] The requirement of a finding of an appeal to prurient interest is not significantly different in the charge under *Memoirs* from the statement in *Miller*. The requirement, as charged, that the materials be shown to be utterly without redeeming social value imposed a greater burden on the government than showing, under *Miller*, a lack of serious literary, artistic, political, or scientific value.

It is only with respect to the second element of obscenity as described in *Miller* that there is even arguably any difference from the *Memoirs* standard which might be advantageous to petitioners. Under *Miller*, material pictures must depict "in a patently offensive way, sexual conduct specifically defined by the applicable state[9] law". *Miller, supra*, slip op. at 10.[10]

[8] "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole appeals to the prurient interest, * * * (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value [citations omitted]." *Miller, supra*, slip op. at 9–10.

[9] "[The *Miller*] standards are applicable to federal legislation." *United States* v. *12 200-Ft. Reels of Film, supra*, slip op. at 7.

[10] As examples of "sexual conduct" which might be "specifically defined" in an obscenity law the Court suggested (*Miller, supra*, slip op. at 11):

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or description of masturbation, excretory functions, and lewd exhibition of the genitals."

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This element, too, was adequately comprehended in the instructions to the jury. In finding that the material was "patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters" (Pet. App. 28), the jury found at least that the brochure "depict[ed] or describe[d], in a patently offensive way, sexual conduct". There remains only the question whether that "sexual conduct" was "specifically defined by the applicable * * * law."

This Court has indicated that the terms in current federal obscenity statutes, such as 18 U.S.C. 1461 under which petitioners were convicted, are to be construed as applying only to "patently offensive representations or descriptions of that specific 'hardcore' sexual conduct given as examples in *Miller* v. *California* * * *". *United States* v. *12 200-Ft. Reels of Super 8 mm Film*, No. 70–2, decided June 21, 1973 (slip op. at 7, n. 7). The examples given in *Miller* (see note 10, *supra*, p. 6) include descriptions of "ultimate sexual acts, normal or perverted", masturbation, and "lewd exhibition of the genitals". The description of the brochure in the court of appeals' opinion (Pet. App. 18) makes it clear that there can be no dispute that the brochure depicts the specific sexual conduct regulated by 18 U.S.C. 1461, as construed by *12 200-Ft. Reels of Film, supra*.[11]

[11] See also the court's summary (Pet. App. 19):

"[The brochure] stands alone, with its portrayals of explicit sexual activities between persons, among groups of persons, and a person and beast, as, simply put, hard core pornography under any definition or test."

Petitioners also suggest that measuring the brochure against a national community standard was error in light of *Miller*. *Miller* makes it clear that juries in obscenity cases need not apply a national standard, but does not indicate that such a standard is unconstitutional. Since the primary purpose of the community standard test is to assure that material will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person, or a totally insensitive one (*Miller, supra,* slip op. at 19), it is clear that application of a national, rather than a state, standard is not improper. See *United States* v. *Miller,* 482 F. 2d 1379 (C.A. 9). In any event, the court of appeals made its own independent constitutional judgment as required by *Jacobellis* v. *Ohio, supra,* 378 U.S. at 188, and found the brochure obscene under both standards (Pet. App. 39–40).

Petitioners' other contentions were all correctly answered in the court of appeals' opinion, upon which we rely.[12] We note in addition that with respect to the testimony on the materials' prurient appeal to sexually deviant groups and the court's instructions thereon, this was a proper application of the prurient-appeal test. *Mishkin* v. *New York,* 383 U.S. 502, 508–509, n. 7. If material which appeals to the prurient interest of clearly defined sexually deviant groups can satisfy the prurient-appeal test (*Mishkin, supra*), it does not cease to be obscene when combined with material which

[12] Petitioners assert that the evidence was insufficient to prove scienter; that the trial court erroneously excluded from evidence allegedly comparable pornographic material; that the trial court committed reversible error by not allowing objections

appeals to the normal person's prurient interest. With respect to petitioners' contention that young persons were improperly excluded from the jury wheel, we refer the Court to our oppositions to petitions for writs of certiorari in *Crews* v. *United States,* No. 72–6021, certiorari denied, 411 U.S. 908, and *D'Orsay* v. *United States,* No. 73–5288, certiorari denied, December 3, 1973, copies of which we are serving on petitioners.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

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to jury instructions outside the presence of the jury; that the trial court erred in allowing testimony on the appeal of the material to the prurient interest of a clearly defined sexually deviant group; that the trial court erred in instructing the jury on pandering; that the prosecutor erred in his presentation of the evidence to the grand jury; that young persons were erroneously excluded from the jury wheel and the trial court erred in denying a continuance so that more young persons could presumably be added to the wheel; and that the trial court erroneously refused to ask some of the questions posed by petitioners on *voir dire* examination of prospective jurors.

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-507

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petitioners' Reply to Memorandum for the United States in Opposition to Petition for a Writ of Certiorari.

1. The judgment in the case at bar is in direct and irreconcilable conflict with a later case decided by the Ninth Circuit. *United States v. Henson,* .... F.2d .... (Ninth Circuit, No. 73-2063, October 5, 1973). In *Henson,* as in the case at bar, a jury convicted after being instructed pursuant to the *Roth-Memoirs* test. In vacating the judgment of conviction, the court said:

> "In instructing the jury in respect to the question of obscenity, the trial judge generally and properly enunciated the tests as they were to be found in controlling Supreme Court authorities existing at the time, principally, *Roth v. United States,* 354 U.S. 476 (1957), and *Memoirs v. Massachusetts,* 383 U.S. 413 (1966). Thereafter,

on June 21, 1973, and after the entry of the judgments of conviction here challenged, the Supreme Court issued a series of opinions in which its prior definitions of obscenity were in part repudiated and in which *some elements of the previously existing tests applied by the District Court in this case were generally characterized as vague, ambiguous, or essentially meaningless.*" (Emphasis added.)

After vacating the judgment of conviction, the court remanded the case to the district court for reconsideration in light of this Court's decisions of June 21, 1973, and in light of *Stroud v. State*, ... Ind. ...., 300 N.E. 2d 100 (Aug. 21, 1973), and *Mohney v. State*, ... Ind. ...., 300 N.E. 2d 66 (Aug. 21, 1973). In *Stroud* and *Mohney*, the Indiana Supreme Court declared the Indiana obscenity statute unconstitutionally vague in light of this Court's June 21, 1973 decisions.[1]

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[1]The Government, in seeking rehearing in *Henson*, with a suggestion for a rehearing en banc, states: "The opinion of the panel . . . must be read as holding that the obscenity test used at trial was repudiated by the Supreme Court in *Miller v. California* as unconstitutionally vague." (Govt. Pet. for Rehearing in *Henson*, 11). On December 3, 1973, the court made an order in *Henson*, deferring action on the Government's Petition for Rehearing With Suggestion for Rehearing En Banc, "pending the court's disposition of a number of cases now pending before the full court *en banc*, the disposition of which may affect the court's opinion in the subject case." One of the cases before the Ninth Circuit en banc is *United States v. London Press, Inc., et al.*, Nos. 72-2938 through 72-2942. This case involves issues virtually identical to those raised in the case at bar and, indeed, involves the identical brochure involved in the case at bar. It should be noted that no member of the panel which decided the case at bar is an active member of the Ninth Circuit. The case was argued on November 1, 1972 before a panel consisting of two retired Senior Circuit Judges (Barnes and Jertberg), and a retired Senior District Judge (East). The opinion was filed in the Office of the Clerk of the Court of Appeals for the Ninth Circuit on June 7, 1973. Judge Jertberg died on June 8, 1973, without having

More recently, on December 3, 1973, the Louisiana Supreme Court reached the conclusion that the Louisiana obscenity statute was unconstitutional in light of *Miller v. California*, 93 S.Ct. 2607. *Louisiana v. Shreveport News Agency, Inc.*, ... La. .... (Supreme Court of Louisiana, No. 53,985).

Still more recently, on December 11, 1973, the Tenth Circuit concluded that a guilty verdict returned by the jury pursuant to instructions given under the *Roth-Memoirs* test could not stand in light of *Miller*. *United States v. Friedman, et al.*, ... F.2d .... (10 Cir., No. 72-1143-44).

2. In response to petitioners' argument that the *Roth-Memoirs* test, as it existed prior to June 21, 1973, was unconstitutionally vague, the Government argues: "At no point did this Court in its obscenity decisions indicate that its clarification and modification of the *Roth* and *Memoirs* standards were required because those standards were unconstitutional. See, *United States v. Thevis*, 484 F.2d 1149 (C.A. 5); *United States v. One Reel of Film*, 481 F.2d 206 (C.A.1)." (Memo. for the U.S., 3-4).

The cases cited by the Government suggest the necessity for a full review by this Court to determine whether the federal obscenity statutes were unconstitutional, at least prior to June 21, 1973. *United States v. One Reel of Film*, 481 F.2d 206 (1 Cir. 1973), was a civil importation case tried before a judge sitting without a

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affixed his signature to the opinion. The Los Angeles Times (June 9, 1973) reported that Judge Jertberg had been "hospitalized with cancer" a few months before his death. In light of Judge Jertberg's death, the denial of Petition for Rehearing herein was made solely by Circuit Judge Barnes and District Judge East. See, 28 U.S.C. §46(b).

jury. Prior to June 21, 1973, the judge found the film ("DEEP THROAT") obscene. The court of appeals affirmed. Addressing itself to the question of whether a national standard or a local standard applies in federal obscenity cases, the court said: ". . . While it is now clear . . . that a national community standard is not required in state prosecutions, *the Supreme Court's recent decisions leave unclear whether proceedings under federal statutes,* 'reaching . . . to all parts of the United States whose population reflects many different ethnic and cultural backgrounds,' *still require,* as was suggested in Manual Enterprises v. Day, 370 U.S. 478, 488, 82 S.Ct. 1432, 1437, 8 L.Ed.2d 639 (1962), *reference to a 'national standard of decency.' See* Excellent Publications, Inc. v. United States, 309 F.2d 362, 365 (1st Cir. 1962). . . ." (481 F.2d at 208, n.2) (emphasis added). The court said that it did not read this Court "as requiring a local standard in proceedings under §1305(a). . . ." (*Id.*) Judge Coffin, concurring, added a few words "only to underscore the fact that we continue to apply 'national standards' in the judgment of this appeal, notwithstanding the reference to such by the Supreme Court in Miller v. California . . . as involving an 'exercise in futility' to define what is 'hypothetical and unascertainable'. We do so because of the nature of the federal statute . . . and because we see no other alternative if we are to participate meaningfully in the review process. . . . [W]ere we to remand for a ruling in accordance with Massachusetts-or-Boston standards, we as a reviewing panel would be two-thirds disabled in passing judgment on prurient appeal and patent offensiveness, for one of us is from Rhode Island and one from Maine. On the other hand, if our function is merely to see that the

proper law was applied—or, where there was jury, that the correct instructions were given—and once satisfied, to accept any ensuing finding, it could be said that such review was in name only, and certainly not the 'independent review' by an appellate court which is needed to safeguard First Amendment values. . . ." (481 F.2d at 210-211).[3]

United States v. Thevis, 484 F.2d 1149 (5 Cir. 1973), concluded that the relevant standard for a federal obscenity case is a local standard, not a nationwide one. The Fifth Circuit took the view that *Orito* and *12 200-Ft. Reels* incorporated the *Miller* standard, lock, stock and barrel, including "local" standards. The Fifth Court stated that it "might be noted that *Miller* relaxes the government's burden by eliminating the *Memoirs* requirement that the material be proven 'utterly without redeeming social value', and by the Court's clarification that '*community standards' does not refer to a nationwide community*. . . ." (484 F.2d at 1154) (emphasis added).

It thus appears that the First Circuit holds to the view that notwithstanding *Miller* a nationwide standard must be applied in federal obscenity cases, and that the Fifth Circuit is of the view that a local standard applies

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[3]In *United States v. One Reel of Film*, 401 F.2d 206, the court was of the view that "DEEP THROAT" offended national standards. This conclusion is highly questionable, in light of a number of jury trials involving this film. Juries found the film not obscene in Birmingham, New York, Jacksonville, Florida, and Miami, Florida. A trial in Los Angeles, California ended in a hung jury, 9-3 for acquittal. In Chicago, Illinois, a jury split 6-6. In Nashville, Tennessee, the vote was 7-5 in favor of the film. "DEEP THROAT" has played without interruption by the authorities in San Francisco for more than a year. In Los Angeles alone, approximately 500,000 adults paid to view the film while showing at a single theatre.

in federal cases.[3] This conflict between Circuits presents a substantial question requiring resolution by the Court.

3. The Government argues that *Miller* "does not indicate" that the utilization of a national standard "is unconstitutional" (Memo. for the U.S., 8).

In *Miller*, this Court observed that our Nation is too big and too diverse for the Court to be able to articulate "a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain material 'prurient', it would be unrealistic to require that the answer be based on some abstract formulation." (93 S.Ct. at 2618). To structure an obscenity prosecution around evidence of national community standards "would be an exercise in futility" (93 S.Ct. at 2618). The Court found nothing in the First Amendment that requires a jury to consider "*un-*

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[3]On December 12, 1973, the Honorable Bailey Brown, C.J., dismissed an obscenity indictment in the case of *United States v. Carter, et al.*, United States District Court for the Western District of Tennessee, Memphis Division, Cr. No. 72-207, on the ground, *inter alia*, that there is hopeless confusion as to whether national or local standards are to be used in a federal obscenity prosecution. In *United States v. Bloom, et al.*, United States District Court for the Western District of Virginia, Roanoke Division, No. 72-CR-35-R, the court denied a motion to dismiss an indictment brought under 18 U.S.C. §1461, saying, *inter alia*, that the relevant community was the judicial district in which the indictment was brought. Thereafter, on November 9, 1973, the court made an order stating:

> "The court is of the opinion that the rulings and orders this day entered herein involve controlling questions of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the rulings and orders may materially advance the ultimate determinations of this action, pursuant to the provisions of Title 28, USC sec. 1292(b), an interlocutory appeal is granted."

ascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact." (93 S.Ct. at 2619) (emphasis added). The Court cited with approval Chief Justice Warren's observation in *Jacobellis v. Ohio*, 378 U.S.184, 200, "that there is no provable 'national standard'. . . . [I]n all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."

It thus appears that the Government is in error when it argues that "[a]t no point did this Court in its obscenity decisions indicate that its clarification and modification of the *Roth* and *Memoirs* standards were required because those standards were unconstitutional" (Memo. for the U.S., 3). A standard that is "unascertainable", "hypothetical", "unprovable" and "abstract" is, it is respectfully submitted, vague. This would be so even in an ordinary criminal statute. It is *a fortiori* so where, as here, we touch upon First Amendment rights.

4. The Government is also in error when it argues that the rejection by this Court of the *Memoirs* three-pronged test, particularly the "utterly without redeeming social value" test, was solely to make obscenity convictions easier and had nothing to do with the vagueness of the *Roth-Memoirs* three-pronged test. In *Miller*, this Court spoke of the "intractable obscenity problem". Quoting Justice Harlan, Chief Justice Burger wondered if the "utterly without redeemng social value" test "had any meaning at all". The Court pointed to the "variety of views among the members of the Court unmatched in any other course of constitutional adjudication". Noting that because there was no majority

view, the Court "was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment". The Court noted that this procedure had cast it in the role of an unreviewable board of censorship, *subjectively* judging each piece of material brought before the Court. The *Memoirs* test, the Court concluded, "has been abandoned as *unworkable* by its author, and no member of the Court today supports the *Memoirs* formulation." (93 S.Ct. at 2610, 2613, 2614) (emphasis added).

It was in light of the above that the Ninth Circuit concluded, in *United States v. Henson*, ... F.2d .... (No. 73-2063, October 5, 1973), that the discarded *Memoirs* test of obscenity was "vague, ambiguous and essentially meaningless".

5. The Government has failed to comment on the *ex post facto* problems that emerge from its attempt to save §1461 by reading into it, retroactively, the specifically defined sexual conduct which is absent from §1461. In *Miller*, the Court emphasized that a statute designed to regulate obscenity *must be carefully limited*. As a result, the Court confined the permissible scope of such regulations to works which depict or describe sexual conduct, which conduct "must be specifically defined by the applicable . . . law, as written or authoritatively construed". The authorative construction, of course, must have been made prior to the time the conduct in issue occurred. *Bouie v. City of Columbia*, 378 U.S.347; *Douglas v. Buder*, 93 S.Ct.2199.

United States v. Thevis, 484 F.2d 1149 (5 Cir. 1973), relied on by the Government, concluded that footnote 7 in *United States v. 102 Reels of Film*

corrected, *retroactively*, the constitutional deficiency of §1461. In *Louisiana v. Shreveport News Agency, Inc.*, ... La. .... (Supreme Court of Louisiana, No. 53-954), the court addressed itself to this issue. The Louisiana statute, like §1461, used the general terms "obscene, lewd, lascivious" etc. In concluding that the Louisiana statute was unconstitutional, Justice Barham, speaking for the court said:

> ". . . [I]t must be obvious even to laymen and surely to this Court, that [the Louisiana obscenity statute] does not meet the guidelines and standards set forth by the United States Supreme Court in Miller v. California.
>
> "We are urged by the State, however to take the two examples, which the Miller majority opinion suggests state legislatures might define for regulation of certain obscene materials, and to make them the obscenity statute for Louisiana. . . .
>
> "In United States v. 12 200 Ft. Reels of Super 8mm. Film . . . the Chief Justice . . . stated in Footnote 7, in pure obiter dictum, that the Supreme Court was prepared to construe 'obscene', 'lewd', 'lascivious', 'filthy', 'indecent', or 'immoral', for the purpose of reviewing the constitutionality of the federal statutes . . . as being limited to 'specific-hard-core' sexual conduct given as examples in Miller v. California. We are bound by the holdings of the United States Supreme Court. We are not bound by the passing remarks of the authors of the opinions from that Court. We are not of the opinion that we are endowed with the constitutional authority to re-draft Louisiana's obscenity statute. . . ." (Slip Opinion, 7-8).

Even if the language in *United States v. 12 Reels of Film*, 93 S.Ct.2665, Footnote 7, is more than "pure obiter dictum", it certainly did not purport to have any retroactive effect.

The question in the case at bar is not, as the Government suggests, whether the brochure comes within the examples of "specifically defined sexual conduct" set forth in *Miller* (Memo. for the U.S., 6-7). Rather, the question is whether the statute met constitutional requirements prior to June 21, 1973. As we have shown above, §1461 was constitutionally infirm prior to said date.

6. The Government argues that any constitutional infirmity which might have flowed from the fact that the jury was instructed to measure the material by a non-existent national standard was cured because the court of appeals made its own constitutional judgment and found the brochure obscene under both a national and local standard (Memo. for the U.S., 8). The Government has overlooked the importance this Court placed upon *the jury* in obscenity cases. It is for the jury in the first instance to determine whether a challenged publication offends the relevant standards and appeals to prurient interest. In the case at bar, the jury was instructed to utilize national standards in answering these questions. If the jury was engaged in a futile exercise in attempting to answer these questions, petitioners have been denied a fair trial. If, as the Government argues, the court of appeals found that the brochure offended local standards, the court made that finding in the total absence of any evidence in the record on that issue and in the absence of a jury finding to that effect. In their Petition for a Writ of

Certiorari, petitioners pointed out that their attempt to prove to the jury that the publication at issue did not offend local standards was excluded. At no time was the jury instructed that it could not find the material obscene unless it found that it offended "local" standards. In short, the Government seeks by this argument to deprive petitioners of the right to a fair jury trial on the issue of obscenity, a right which this Court repeatedly emphasized in its decisions of June 21, 1973.

7. The Petition for a Writ of Certiorari noted that the Indictment, as amplified by the Bill of Particulars, charged only that the material appealed to the prurient interest of the average person, but that the trial court instructed the jury that it was free to measure the publication by its appeal to the prurient interest of the average ordinary adult, "or by a clearly defined deviant group". Petitioners argued that the jury was thus left free to return a verdict of guilt even if the brochure did not appeal to the prurient interest of the average person. (Petition, 50-51). The Government responded irrelevantly, stating that if material "which appeals to the prurient interest of clearly defined sexually deviant groups can satisfy the prurient appeal test . . . it does not cease to be obscene when combined with material which appeals to the normal person's prurient interest" (Memo. for the U.S. 8-9).

In *Miller*, the Court stated: "As the Court made clear in *Mishkin* . . . the primary concern with requiring a jury to apply the standard of 'the average person . . .' is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person. . . ." (93 S.Ct. at 2620). In *Mishkin v. New York*, 383 U.S. 502, 508, the Court stated

that where the material "is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group."

In the case at bar, the sole evidence was that the brochure was designed for, and exclusively disseminated to, the public at large, and not to any clearly defined deviant sexual group. The court of appeals acknowledged that the Indictment did not charge that the brochure was designed for, or primarily disseminated to, a clearly defined deviant sexual group. Accordingly, it was clear error for the trial court to instruct the jury that it was free to return a verdict of guilt even if the brochure did not appeal to the prurient interest of the average person.

8. Petitioners argued that §1461, as construed to eliminate guilty knowledge, was unconstitutional and that the Government failed to even prove that petitioners knew the contents of the brochure in question (Petition, 31-42). The Government responded to petitioner's ten-page argument with ten simple words: "Petitioners assert that the evidence was insufficient to prove scienter" (Memo. for the U.S., 8, n.12).

9. Petitioners argued that they were denied a fair trial because the trial court excluded an entire category of evidence, including publications found not obscene by this Court, following findings of obscenity by lower courts (Petition, 44-47). Again the Government's answer is brief, if not illuminating. In a footnote, the Government states: "Petitioners assert . . . that the trial court erroneously excluded from evidence allegedly

comparable pornographic[4] material" (Memo. for the U.S., 8, n.12).

10. Petitioners argued that they were entitled to a reversal by reason of the fact that the trial court violated Rule 30 of the Federal Rules of Criminal Procedure. Petitioners pointed out that the Tenth Circuit had specifically held that failure to comply with the provisions of Rule 30 is clear reversible error. *Hall v. United States*, 378 F.2d 349 (1967). (Petition, 47-49.) The Government was not bothered by the conflict between the Circuits and answered this point of the Petition as follows: "Petitioners assert . . . that the trial court committed reversible error by not allowing objections to jury instructions outside the presence of the jury" (Memo. for the U.S., 8, n.12).

11. The Government either totally ignored or failed to meaningfully discuss petitioners' argument that the brochure was not obscene; that the trial court erred in instructing the jury on pandering since pandering was not charged; that the prosecutor made misleading, biased, prejudiced and emotionally charged remarks to the Grand Jury with respect to the standards for judging obscenity; that the trial court erred in denying petitioners a short continuance which would have assured the presence of members of a cognizable class (of young people) in the jury pool; that the trial court erroneously refused to ask prospective jurors questions touching upon their background and religious attitudes to enable petitioners to exercise intelligently their peremptory challenges and challenges for cause.

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[4]The Government appears to be of the view that the publications found not obscene by this Court in *Burgin v. South Carolina*, 404 U.S.806 (which were offered in evidence) were pornographic.

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Supreme Court, U. S.
FILED
FEB 27 1974
MICHAEL RODAK, JR., CLERK

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WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, LIBRARY SERVICE, INC.,

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UNITED STATES OF AMERICA,

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BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Statement

This *amicus curiae* brief is submitted on behalf of the Association of American Publishers, Inc. (hereinafter referred to as the "AAP") pursuant to Rule 42 of the Rules of the Supreme Court of the United States, in support of Petitioners. Counsel for Petitioners and Respondent have consented to the filing of this brief and the letters of consent are filed herewith.

Interest of the AAP

The AAP is a trade association organized under the laws of the State of New York. It is composed of publishers of general books, textbooks and educational materials. Its more than 260 members, which include many university presses and religious books publishers, publish in the aggregate the vast majority of all general, educational and religious books produced in the United States. None of the Petitioners is either a member of or in any way affiliated with the AAP. Neither is the publisher of "The Illustrated Presidential Report of the Commission on Obscenity and Pornography", the subject of the brochure here in issue, a member of the AAP.

The AAP has filed an *amicus curiae* brief in support of the Appellant in *Jenkins* v. *Georgia* (No. 73-557) which, according to the Court's Order of January 14, 1974, will be heard in tandem with the instant case. In light of this indication that the two cases will be considered together, the AAP respectfully requests the Court to consider both the statement of interest and all of the arguments set forth in its *amicus* brief in *Jenkins* when reviewing the convictions of the Petitioners herein. *Amicus* purposely has not burdened the Court by a repetition of those arguments which, it submits, are equally applicable to the issues presented by this case.

The AAP files this additional brief because it believes that the facts and issues involved in this case, while clearly different from those in the *Jenkins* case, equally compel the conclusion that the limits of obscenity regulation should

be permitted to extend no further than well defined efforts to avoid exposure to minors and intrusion on the privacy and sensibilities of unwilling adults.

ARGUMENT

This case on certiorari from the Court of Appeals for the Ninth Circuit involves the criminal convictions of the Petitioners for the mailing of materials which the jury and the Circuit Court found to be obscene under 18 U.S.C. §1461. Prior to the verdict of the jury in the criminal trial, no judicial determination of obscenity with respect to these materials had been made. And yet, in addition to substantial fines, Petitioner Hamling has been sentenced to four years imprisonment, Petitioner Kemp to three years and one day and Petitioners Wright and Thomas to one and a half years suspended, but with five years of probation. The Petitioners are presently free on bail pending review of their convictions by this Court—and that temporary freedom has been gained only by posting bail in sums ranging from $1,000 to $15,000.

These convictions and severe penalties result from the jury's determination that the materials were "nonmailable matter" because they are "obscene, lewd, lascivious, indecent, filthy or vile" (18 U.S.C. §1461). As the numerous examples set forth in the AAP's *amicus* brief in *Jenkins* amply demonstrate, certain juries might equally find books by Kurt Vonnegut, Edgar Lee Masters or other equally renowned authors to be "obscene, lewd, lascivious, indecent, filthy or vile". Clearly, the prohibitions set forth in Section 1461 provide no standard whatsoever.

While the jury here was instructed to determine obscenity by applying the three-pronged *Roth-Memoirs*[1] test and while that test has been further modified by the *Miller* ruling,[2] the AAP submits that neither the *Roth-Memoirs* nor the *Miller* nor, indeed, any other articulation provides or can provide sufficient amplification of the terms "obscene, lewd, lascivious" etc. to guide the conduct of the producers or distributors of any written or visual materials.

Indeed, notwithstanding the recent *Miller* amplification and attempted clarification of the definition of obscenity, the Second Circuit Court of Appeals in affirming an obscenity ruling with respect to the animated cartoon Sinderella acknowledged that "probably every judge" of this Court would admit to the "inability" to define obscenity specifically but in reaching a decision would "rely" on Mr. Justice Stewart's comment in *Jacobellis* v. *Ohio*. 378 U.S. 184 (1964) that "I know it when I see it." It would appear that the "I know it when I see it" approach led directly to the Second Circuit affirmance in *U.S.* v. *Sinderella* (73-1171) N.Y. Law J., Feb. 13, 1974, p. 1, col. 3.

The AAP submits that if the distinguished judges of the Second Circuit are relegated to this subjective standard, juries—grand and petit—will rely on their own personal and subjective reactions to the materials they are considering. And, here, it even appears that the members of the grand jury were advised to be "guided solely by their instinctive feeling" by the standards of "moral judg-

1. *Roth* v. *United States*, 354 U.S. 476 (1957); *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966).

2. *Miller* v. *California*, 413 U.S. 15 (1973).

ment" which they had "assimilated through the totality of their experience" and that they were the "sole judges of the contemporary community standards of this country" (481 F.2d 307, 312 (9th Cir. 1973)). While these comments exacerbate the inevitably subjective and emotional nature of the determination jurors must make, the AAP believes that determinations of obscenity will be subjective regardless of the tests the jurors and/or judges seek to apply.

To subject Petitioners, or anyone else, to the harshness of the criminal process for activities not known to be unlawful until a judge or jury has convicted and sentenced them is a gross violation of due process and a severe blow to the First Amendment protection of all ideas—even, and especially, controversial ideas.

The AAP does not suggest, by the filing of this brief, that the materials here involved may not offend those who received them unsolicited through the mails. Through such mailings, materials such as these in question may well infringe upon the privacy and sensibilities of adults and may well get in the hands of minors contrary to the desires of their parents.

To prevent such intrusion or thrusting, the AAP believes that carefully drawn regulations on the dissemination of unsolicited materials can be appropriate. Although 18 U.S.C. §1461 does deal with mailings, it is too crude a statute to apply to prevent thrusting. It makes no distinction between solicited and unsolicited materials; it requires the imposition of criminal penalties as its sole sanction and it neither provides remedies for the recipients of such unsolicited materials nor mechanisms for such persons to be protected from thrusting or pandering.

Because 18 U.S.C. §1461 is the principal law under which Petitioners were charged and convicted, the AAP respectfully submits that the convictions herein should be reversed regardless of whether the manner of dissemination of the materials in question could properly and constitutionally be regulated.

Conclusion

For the reasons set forth herein as well as for all of the reasons set forth in its *amicus* brief in *Jenkins* v. *Georgia*, the Association of American Publishers, Inc. requests the Court to reverse the convictions rendered and affirmed below.

Respectfully submitted,

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I.

The Provisions of Title 18 United States Code §1461, on Their Face and as Construed and Applied to Petitioners' Pre-June 21, 1973 Conduct, Violated the Guarantees of the First and Fifth Amendments to the United States Constitution, Because They Failed to Provide "Fair Notice" or "Concrete Guidelines" as to What Sexual Expression Was Prohibited by the Provisons of the Statute 16

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-507

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, and LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Petitioners Hamling, Reed Enterprises, Inc. and Library Service, Inc.

Opinion Below.

The opinion of the Court of Appeals is reported at 481 F.2d 307 and appears in Appendix A to the Petition for Writ of Certiorari, pages 1 through 38.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 7, 1973. A due and timely petition for rehearing and suggestion for rehearing *en banc* was filed on or about June 18, 1973. On August 22, 1973, an order was entered stating that

the aforesaid petition "will be submitted to the full court".[1] A copy of the said order appears in Appendix B to the Petition for Writ of Certiorari, pages 39 and 40. On August 23, 1973, an order was entered denying the petition for rehearing and rejecting the suggestion for a rehearing *en banc*. A copy of the said order appears as Appendix C to the Petition for Writ of Certiorari, page 41. On August 28, 1973, the Honorable Stanley N. Barnes, a Judge of the United States Court of Appeals for the Ninth Circuit, made an order staying issuance of the mandate of the court pending the filing, consideration and disposition by this Court of a Petition for a Writ of Certiorari on or before September 24, 1973. A copy of the said order appears as Appendix D to the Petition for Writ of Certiorari, page 42. The Petition was filed on September 8, 1973 and granted on January 14, 1974. Jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether the provisions of Title 18 United States Code §1461, on their face and as construed and applied to petitioners' pre-June 21, 1973 conduct, violated the guarantees of the First and Fifth Amendments to the United States Constitution, because they failed to provide "fair notice" or "concrete guidelines" as to what sexual expression was prohibited by the provisions of the statute.

2. Whether, in light of this Court's June 21, 1973 rulings, the Indictment herein is fatally defective because it failed to inform petitioners of the nature and

[1]An order was initially entered on July 9, 1973, denying the petition for rehearing, but was thereafter, by order of the court, withdrawn on July 19, 1973.

cause of the accusations against them in violation of the provisions of the Sixth Amendment.

3. Whether the provisions of Title 18 United States Code §1461, on their face and as construed and applied to authorize the jury to measure the prurient appeal of the brochure by its impact on undefined sexually deviant groups rather than solely by its impact on the average person in the Nation as a whole, violated the free speech and press provisions of the First Amendment and the due process provisions of the Fifth Amendment.

4. Whether the provisions of Title 18 United States Code §1461, on their face and as construed and applied, violate the free speech and press provisions of the First Amendment and the due process provisions of the Fifth Amendment, because the trial court instructed the jury that it could find the brochure obscene even if the brochure did not meet the *Roth-Memoirs* test if the jury found "pandering", notwithstanding the fact that neither the statute nor the Indictment fairly advised petitioners that they were charged with pandering.

5. Whether the brochure at issue is protected by the free speech and press provisions of the First Amendment.

6. Whether petitioners were denied a fair trial, and due process of law, when the trial court, in open defiance of Rule 30, Federal Rules of Criminal Procedure, denied petitioners the opportunity to make objections to the court's jury charge outside the presence of the jury.

7. Whether petitioners were denied a fair trial by an impartial and representative jury, in violation of the guarantees of the Fifth and Sixth Amendments.

8. Whether the provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the Indictment was returned by a Grand Jury which was presented with no evidence of the essential elements of the offense charged which was misdirected by the prosecutor as to the applicable law, and where the prosecutor appealed to the biases and prejudices of the members of the Grand Jury, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

9. Whether the provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, under a standard for judging scienter solely by alleged proof of knowledge of the "contents" of the brochure involved, the courts below having rejected any requirement of proof of knowledge of the alleged obscenity of the brochure or proof of reckless disregard of the alleged obscenity, or intent to commit a public wrong, and specifically rejecting a defense of honest ignorance of the alleged obscenity of the brochure, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute an infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

10. Whether the provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, without any evidence to establish that each of the petitioners even possessed knowledge of the alleged contents of the brochure, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

11. Whether the provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, without proof of the essential elements of obscenity and scienter, or proof of corrupt agreement or aiding and abetting or causation by petitioners, under both the conspiracy and substantive counts of the Indictment, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

12. Whether the provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the trial court excluded an entire category of constitutionally relevant evidence offered by petitioners on the issues of nonobscenity of

the brochure and lack of guilty knowledge, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

This Brief deals with Questions 1 through 8, inclusive. The companion Brief filed on behalf of petitioners Earl Kemp, Shirley R. Wright and David L. Thomas deal with Questions 9 through 12, inclusive. Petitioners herein incorporate by reference as though fully set forth herein the argument made in the said companion Brief.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fifth, Sixth and Eighth Amendments; Title 18 United States Code §§2, 371 and 1461; and Rule 30 of the Federal Rules of Criminal Procedure appear in Appendix E to the Petition for Writ of Certiorari, pages 43 through 46.

Statement.

1. The Indictment was returned on March 5, 1971. The brochure at issue was mailed on specified dates in December of 1970 and January 1971. The judgments of convictions were entered in the District Court on February 7, 1972. The judgments of conviction were affirmed on June 7, 1973. The Indictment, the trial thereunder, the judgments of conviction and the affirmance of said judgments rest upon standards which existed prior to the rulings of this Court on June 21,

1973 in *Miller v. California*, 413 U.S. 15, and the related cases.

2. The Indictment [J.A. 14-31][2] charged the individual and corporate petitioners with violations of 18 U.S.C. §§2 and 1461, and a conspiracy to violate the said statutes, contrary to the provisions of 18 U.S.C. §371. Although the Indictment was in 21 counts, the works involved were two in number. One item was a book entitled *The Illustrated Presidential Report of the Commission on Obscenity and Pornography* (hereinafter referred to as "The Illustrated Report"). The other item was a brochure advertising the book. Essentially, the Indictment charged that the book was "obscene, lewd, lascivious, indecent, filthy and vile"; that the brochure similarly violated the federal obscenity statute; and, in addition, that the brochure gave information where, how, from whom and by what means *The Illustrated Report* might be obtained, in violation of §1461. The jury was unable to reach agreement on the charge made against *The Illustrated Report* or on the charge made against the brochure that it gave information how the book might be obtained. The petitioners were convicted therefore solely of mailing the brochure and conspiring to mail the brochure.[3]

3. Petitioners filed a series of pre-trial motions, including a motion to dismiss the Indictment, upon the

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[2]The reference "J.A." is to the Joint Appendix. The reference "C.T." is to the Clerk's Transcript on appeal to the Court of Appeals for the Ninth Circuit. The reference "R.T." is to the Reporter's Transcript of the trial.

[3]The publisher of *The Illustrated Report* was Greenleaf Classics, Inc., named as a defendant in the Indictment. The jury returned a verdict of not guilty as to this defendant with respect to the conspiracy charge, as well as the mailing of the brochure.

grounds, *inter alia*, that the Indictment failed to allege the essential elements of obscenity and therefore failed to state facts sufficient to constitute an offense against the United States, and that §1461, on its face and as construed and applied, violated the free speech and press, due process and equal protection provisions of the First, Fifth and Sixth Amendments, and the cruel and unusual punishment provisions of the Eighth Amendment [J.A. 32-34]. Petitioners argued that the statutory terminology, repeated in the Indictment, was, standing by itself, essentially meaningless, and that this Court had not yet given the statutory language "a settled meaning".

Petitioners also filed a motion for a bill of particulars which requested the Government to state "the essential elements" of the term "obscene" [J.A. 35-38]. The Government responded that for purposes of argument it would assume "that the three-fold test, as enumerated in the plurality opinion in *Memoirs v. Massachusetts*, 383 U.S.413, 418, is the appropriate standard" [J.A. 44-45].

In connection with a separate motion to dismiss the Indictment because of matters occurring before the Grand Jury, a pre-trial evidentiary hearing elicited testimony from the prosecutor who presented the case to the Grand Jury [R.T. 13-14] that he had advised the Grand Jury to be "guided solely by their instinctive feeling" [R.T. 19-20]; that they were to be guided by the standards of "moral judgment" which they had "assimilated through the totality of their experiences" [R.T. 20-21]; that they were "the sole judges of the contemporary community standards of this country" and that the term "contemporary community stand-

ards" refers to "the average conscience of the time" [R.T. 33]. Although the prosecutor was not sworn before the Grand Jury, he detailed to that body the factual situation in *Ginzburg v. United States*, 383 U.S.463, placing particular emphasis on a publication involved in that case; discussed the extent of sales of the book involved in the *Ginzburg* case and the advertisement for the said book; "drew a parallel" between the *Ginzburg* case and the case at bar; and advised the Grand Jury that "we felt that the facts in this case were similar enough to those in the *Ginzburg* case to present [the matter to the Grand Jury] to see if they felt there was probable cause to believe that a Ginzburg-type situation was present [in the case at bar]" [R.T. 28-29].

Petitioners moved to strike the jury venire and challenged the jury panel upon the ground, among others, of a systematic exclusion of an identifiable group within the community, *i.e.*, persons 25 years of age and under [J.A. 65-70]. The hearing before the trial court on this issue established that the master wheel from which the trial jury was drawn was filled in 1968 with the names of then registered voters. In 1971, therefore, the venire from which the trial panel was drawn contained no persons under 24 years of age and very few under 25 years of age [R.T. 73-74]. Petitioners offered evidence establishing that young persons were a cognizable group and more tolerant than older persons in matters relating to the depiction of explicit sexual materials [R.T. 85-86]. The Clerk of the court testified that the master wheel was to be refilled in about one month [R.T. 94-98]. Although the trial court conceded that petitioners would have benefited by having jurors on the panel in the age group 18-25

[R.T. 91-92] and that the evidence presented indicated that "it is time to change the jury master wheel" [R.T. 93], it nevertheless denied the motion to strike the jury panel [J.A. 5]. Thereupon, petitioners moved for a short continuance, of approximately one month, so that their jury would be drawn from a master wheel that included persons 21 years of age or over [R.T. 95-98]. This motion was denied [J.A. 5].

The entire *voir dire* examination was conducted by the trial court [R.T. 99, 137-164, 166-314]. The court declined to ask many of the questions proposed by petitioners. Among the questions petitioners unsuccessfully urged the court to ask the prospective jurors were the frequency with which they attended a place of worship and whether they considered themselves deeply religious; whether they recently had heard a sermon at their place of worship dealing with the subject of obscenity; whether they had ever been a member of or made contributions to the Citizens for Decent Literature, or any other organization having as one of its purposes the control by law of obscene material; whether they had recently seen a film or read a book dealing candidly with sexual matters; and whether they would refrain from viewing a film solely because it was condemned by a publication known as "The Catholic Newsletter" [J.A. 78-81].

4. On the issue of "obscenity", the Government called only two witnesses. Dr. Melvin Anchell, a Medical Doctor and a self-proclaimed psychiatrist without Board certification [R.T. 1606-1609, 1629-1631], testified that in his opinion the dominant theme of the brochure was "pruriency" [J.A. 147]. His total testimony concerning the brochure consisted of that single

word. The trial court recognized that Dr. Anchell was "rigid" [R.T. 2174].

The Government's other expert witness was a Mr. Frank Getlein, a newspaper man. He testified that in his opinion the brochure was a miniature of *The Illustrated Report* and was patently offensive and was utterly without redeeming social value [J.A. 148-151].

Petitioners called four expert witnesses, each of whom testified that the brochure had redeeming social value: Dr. Otto N. Larsen, one of the Commissioners of the Commission on Obscenity and Pornography; Dr. W. Cody Wilson, the Executive Director and Director of Research of the Commission; Dr. Jack Haberstroh, Assistant Professor of Journalism at the San Diego State College; and Professor Dwight V. Swain, a Professor of Journalism and Literature.

Commissioner Larsen and Dr. Wilson also testified that the brochure did not appeal to "prurient interest" and that it did not go beyond "customary limits of candor" in sexual matters and was not patently offensive [J.A. 193-194, 167-169, 170-172, 175, 184-185].

The Government did not put on any rebuttal evidence.

It should be observed that the brochure advertised the book, *The Illustrated Report*, and that a considerable portion of the evidence offered by both the Government and petitioners revolved about the question of the alleged obscenity or nonobscenity of the book, an issue upon which the jury could not agree. It was stipulated by the Government during the trial, that every picture in *The Illustrated Report* was related to the text of *The Commission Report;* that pictures simi-

lar to those appearing in the book were used in various research activities that the Commission undertook; that the photographs and other illustrations in *The Illustrated Report* depicted explicit sexual material within the definition of that term as it was used by the Commission in its *Report;* and that every picture in *The Illustrated Report* was similar to some of the material used by some of the researchers in *The Commission Report* [J.A. 163-165]. Each of the depictions contained in the brochure advertising *The Illustrated Report* appears in the said book, and the statement in the brochure with respect to the probability that the scenes depicted in the brochure were part of the photographs used in one of the studies for the Commission appears to be accurate, in the light of the stipulations by the Government during the trial.

5. Despite the absence of any charge in the Indictment or any proof in the record of alleged "pandering", the trial court nevertheless instructed the jury that even if the brochure did not meet the tripartite *Memoirs* test, still the jury was free to find the brochure obscene if the jury found that the brochure was "produced and sold as stock in trade of the business of pandering" [J.A. 245]. The "pandering" instructions by the trial court to the jury were extensive [J.A. 242-246]. It is important to note that after the jury had begun its deliberations, it requested the court to reread its instructions on obscenity and "pandering" [R.T. 4989-4990].

The trial court instructed the jury: "Prurient interest is a shameful or morbid interest in sex or nudity and you must measure this appeal by the average or ordinary adult or by a clearly defined deviant group as will be explained elsewhere" [J.A. 238-239]. The

trial court then addressed itself to the two aforesaid alternatives. The court first instructed the jury that the brochure could be measured by its appeal to the average adult and not by young persons or persons highly susceptible thereto [J.A. 239]. The court also instructed the jury that if some of the material appealed to the prurient interest of the average person and some of the material appealed to the prurient interest of a deviant sexual group, still the jury would not be precluded from finding that the dominant theme of the material, taken as a whole, appealed to the prurient interest [J.A. 240-241]. The trial court, on the other hand, instructed the jury that "in addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of sexual interest of the intended or probable recipient group" [J.A. 239].

There was never any charge in the Indictment nor any proof in the record that the brochure herein was designed for or primarily disseminated to a clearly defined sexually deviant group rather than the public at large.

To all of the aforesaid denials of petitioners' requested instructions, and to the trial court's instructions, there were appropriate objections made by the petitioners.

6. Rule 30 of the Federal Rules of Criminal Procedure provides that a party may not assign as error any portion of the charge to the jury unless he objects before the jury retires to consider its verdict. The Rule specifically provides that opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

After the court instructed the jury, counsel for petitioners stated a desire to object to portions of the charge and specifically urged the trial court to ask the jury to go into the jury room while petitioners' objections were presented. The trial court denied the request [J.A. 257]. Thereafter, counsel was compelled to make objections to the trial court's instructions in the presence of the jury. The objections were wide-ranging and covered a multitude of areas in which counsel for petitioners claimed erroneous instructions had been given. All of these objections counsel was compelled to make in the presence of the jury [J.A. 258-265].

7. There were appropriate motions made by petitioners for judgments of acquittal at the end of the Government's case and at the end of the entire case, and there were also post-trial motions in arrest of judgment, for a new trial, and for acquittal. All of the said motions were denied.

As heretofore stated, the jury could not agree on a verdict with respect to *The Illustrated Report*. The jury reached a verdict of guilty only with respect to the alleged obscenity of the brochure, both on the conspiracy and substantive counts. Judgments of conviction were entered on February 7, 1972. The petitioner Hamling was sentenced to imprisonment for four years and fined $32,000; petitioner Kemp was sentenced to imprisonment for three years and one day; petitioner Wright was sentenced to imprisonment for one and one-half years, execution of the sentence suspended, and petitioner placed on probation for a period of five years; and petitioner Thomas sentenced to imprisonment for one and one-half years, execution of the sentence suspended, and petitioner placed on pro-

bation for a period of five years. The conditions of probation were extremely onerous. A fine of $43,000 was imposed on petitioner Reed Enterprises, Inc., and a fine of $12,000 was imposed on petitioner Library Service, Inc. Bail for petitioner Hamling was fixed in the sum of $15,000; for petitioner Kemp, in the sum of $10,000; and for each of the petitioners Wright and Thomas, in the sum of $1,000. The said bail was furnished and petitioners were freed on bail pending appeal [J.A. 11-13].

8. As appears from the opinion of the Court of Appeals, the judgments of conviction were affirmed. The court held that 18 U.S.C. §1461 was not unconstitutionally vague and that the use of the statutory language in the Indictment did not fail to advise petitioners of the charge which they were called upon to defend. The court held that the Indictment herein, framed in the language of the statute, was not indefinite or vague.

Petitioners herein have omitted from the Statement of the case that portion related to the issues briefed in the companion brief filed on behalf of petitioners Earl Kemp, Shirley R. Wright and David L. Thomas, and the petitioners herein adopt by reference the Statement of the case, together with the argument and the points of fact and law presented in the brief filed by said petitioners Kemp, Wright and Thomas.

ARGUMENT.

I.

The Provisions of Title 18 United States Code §1461, on Their Face and as Construed and Applied to Petitioners' Pre-June 21, 1973 Conduct, Violated the Guarantees of the First and Fifth Amendments to the United States Constitution, Because They Failed to Provide "Fair Notice" or "Concrete Guidelines" as to What Sexual Expression Was Prohibited by the Provisions of the Statute.

In light of *Miller v. California*, 413 U.S.15, and the related cases, the federal criminal statute involved herein, affecting First Amendment rights, was, prior to June 21, 1973, unconstitutionally vague for the following five reasons:

1. the statute concededly does not contain a description of the specific sexual conduct *Miller* held was constitutionally mandated, and prior to June 21, 1973 the statute had not received an authoritative construction reading the necessary terminology into the statute;

2. prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications offend national standards, which nationwide standards this Court found were unascertainable, unprovable and non-existent;

3. prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications appeal to the prurient interest of the average person in the Nation as a whole, which test this Court labeled "unrealistic";

4. prior to June 21, 1973, the statute had been authoritatively construed as requiring proof

that charged publications were "utterly without redeeming social value", a test this Court found "unworkable" and "ambiguous";

5. prior to June 21, 1973, the statute was so "vague, ambiguous and essentially meaningless" that this Court was compelled to act as an unreviewable board of censorship "subjectively judging each piece of material" charged with being obscene under §1461.

Before examining with particularity the vagueness of the statute, petitioners note that this criminal statute must be scrutinized in light of the strict standards of permissible statutory vagueness applied to a statute having a potentially inhibiting effect on speech and the particularly stringent standards applicable to a *federal* obscenity statute.

In *Miller*, Chief Justice Burger made it clear that the federal and state standards were quite different by citing Justice Harlan's opinions wherein he repeatedly argued for tight federal obscenity laws and looser state laws. (413 U.S. at 29).

The distinction was initially articulated by Justice Harlan dissenting in *Roth* and concurring in *Alberts*, 354 U.S. at 503-508.

> ". . . [T]he interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric."

Justice Harlan went on to say that not only is the federal interest in protecting the Nation against pornography attenuated, "but the dangers of federal censorship in this field are far greater than anything the States may do." Justice Harlan asserted that he would judge a federal obscenity case against the background of "the attenuated federal interest in this field" and in view of the "very real danger of a deadening uniformity which can result from nationwide federal censorship." (*Id.*)

In *Jacobellis v. Ohio*, 378 U.S.184, Justice Harlan, dissenting, expressed the view that the States are constitutionally permitted greater latitude in determining what is bannable on the score of obscenity than is so with the Federal Government. "The more I see of these obscenity cases the more convinced I become that in permitting the States wide, but not federally unrestricted, scope in this field, while holding the Federal Government with a tight rein, lies the best promise for achieving a sensible accommodation between the public interest sought to be served by obscenity laws . . . and protection of genuine rights of free expression." (378 U.S. at 203-204).

In *Miller*, Chief Justice Burger cited with approval the dissenting opinion in *Hoyt v. Minnesota*, 399 U.S. 524, 525, where Justice Blackmun stated that he was not persuaded that the First and Fourteenth Amendments necessarily prescribe a national and uniform measure of what *each of our several States* constitutionally may do to regulate obscene products within its borders. "At this still, for me, unsettled stage in the development of *state law of obscenity* in the federal constitutional context I find myself generally in ac-

cord with the views expressed by Mr. Justice Harlan . . . and with those enunciated by the Chief Justice in *Cain v. Kentucky*, 397 U.S.319 . . . and in *Walker v. Ohio*, 398 U.S.434." (Emphasis added).

This Court has always held that "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith v. California*, 361 U.S.147, 151. This rule was recognized in *Miller*, where the Court cited *Interstate Circuit, Inc. v. Dallas*, 390 U.S.676, 682-685, for the proposition that when First Amendment rights are at stake, "precision of regulation must be the touchstone". Chief Justice Burger recognized "the inherent dangers of undertaking to regulate any form of expression", saying that state statutes designed to regulate obscene materials "must be carefully limited. See, *Interstate Circuit, Inc. v. Dallas, supra*, 390 U.S. 682, 685. . . ." (413 U.S. at 23-24). In *Interstate Circuit*, the Court discussed with approval *Winters v. New York*, 333 U.S.507, where the Court struck down as vague and indefinite a standard pursuant to which publications were condemned if they contained "criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes". In *Interstate Circuit*, the Court also cited with approval *Burstyn v. Wilson*, 343 U.S.495; *Gelling v. Texas*, 343 U.S.960; *Superior Films, Inc. v. Dept. of Education*, 346 U.S.587; *Commercial Pictures Corp. v. Regents*, 346 U.S.587; *Holmby Productions, Inc. v. Vaughn*, 350 U.S.870; and *Kingsley Int'l. Pic. Corp. v. Regents*, 360 U.S.684. These cases had con-

demned as unconstitutionally vague the following standards:

> "Sacriligious", which was found to have such an all-inclusive definition as to result in 'substantially unbridled censorship".
>
> "Of such character as to be prejudicial to the best interest of the people of the city".
>
> "Morally educational, or amusing and harmless".
>
> "Immoral" and "tend to corrupt morals".
>
> "Approve such films . . . [as] are moral and proper; . . . disapprove such as are cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals".
>
> "Unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacriligious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime. . . ."

In *Interstate Circuit*, the Court approved Justice Clark's concurring remarks in *Kingsley Int'l. Pic. Corp. v. Regents*, 360 U.S. at 701, where he stated: "The only limits on the censor's discretion is his understanding of what is included within the term 'desirable, acceptable or proper.' This is nothing less than a roving commission in which individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law. . . ." In *Miller*, Chief Justice Burger observed that the obscenity problem had evoked a variety of views among the members of the Court unmatched in any other course of constitutional adjudication, and added: "This is not remarkable, for in the area of freedom of speech and press

the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities." (413 U.S. at 22-23). In *NAACP v. Button*, 371 U.S.415, the Court said that the objectionable quality of vagueness and overbreadth is the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Cf. *Smith v. California*, 361 U.S at 151-154; *Speiser v. Randall*, 357 U.S.513, 526. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." (371 U.S. at 432-433). See, *Marcus v. Search Warrants*, 367 U.S.717, 733; *Bantam Books, Inc. v. Sullivan*, 372 U.S.58, 65; *Stanley v. Georgia*, 399 U.S.557, 566.

The "vice of vagueness" is especially pernicious where, as here, legislative power over an area involving speech, press, petition and assembly is involved. "For a statute broad enough to support infringement of speech, writings, thoughts and public assemblies, against the unequivocal command of the First Amendment necessarily leaves all persons to guess just what the law really means to cover, and fear of a wrong guess inevitably leads people to forego the very rights the Constitution sought to protect above all others. . . ." *Barenblatt v. United States*, 360 U.S. 109, 137-138 (Black, J., dissenting).

With these principles in mind, petitioners turn to the record in the case at bar.

From first to last, petitioners contended that the provisions of §1461 failed to provide persons of ordinary intelligence a reasonable opportunity to know what the statute prohibited so that they may act accordingly. In their motion to dismiss the Indictment, petitioners contended that §1461, on its face and as construed and applied, was vague, uncertain, ambiguous, overbroad and violative of the free speech and press, due process and equal protection provisions of the First, Fifth and Sixth Amendments and the cruel and unusual punishment provisions of the Eighth Amendment [J.A. 32-35].

Petitioners requested an evidentiary hearing in connection with their motion to dismiss the Indictment, stating that they intended to prove by expert testimony and other oral and documentary evidence that it is impossible for persons of ordinary intelligence to know with reasonable certainty what conduct on their part brings them within the ambit of 18 U.S.C. §1861 [C.T. 134]. They also asseeted that they would show that there is "no such thing as contemporary community standards in the Nation as a whole with regard to matters of sex, nudity and excretion", and that there is "no average person in the Nation as a whole against which to determine whether particular material appeals to the prurient interest of the average person" [C.T. 135]. Petitioners offered to show "by extrinsic evidence that, in fact, the statute is unconstitutionally vague, because persons of ordinary intelligence, and indeed persons of extraordinary intelligence, are unable to determine in advance what is obscene and violative of the Section." [C.T. 137].

In connection with the said motion, petitioners submitted an affidavit of Dr. Jay Ziskin, a clinical psychol-

ogist, a professor and a licensed attorney [J.A. 49]. After setting forth his qualifications, Dr. Ziskin gave his opinion that the tests for judging obscenity were vague, incomprehensible and incapable of objective measurement. He stated that "with regard to the type of sexual stimuli responded to and the manner or nature of the response, there appears to be such a wide variety of responses in the American population as to preclude any meaningful application of the term 'average'." He also asserted that whether material goes substantially beyond contemporary community standards will depend on the geographic character and composition of the "community", and who the person is who purports to determine what "community standards" are. The limits of candor among young people appear to be considerably different from those existing among older people. By way of conclusion, Dr. Ziskin stated that the definition of obscenity "is not one which can be applied by ordinary individuals, including those most concerned, such as booksellers, law enforcement officials and jurors. There is, in fact, no body of knowledge by which experts such as behavior scientists and mental health professionals can make a determination that a given work appeals predominantly to prurient interest of the average person. There is a body of research, mostly contained in the *Report of the Commission on Obscenity and Pornography*, which strongly suggests that the definition is one which cannot be met [J.A. 49-59]. The trial court denied petitioners an evidentiary hearing to support their allegation that §1461 was unconstitutionally vague. See, *Borden's Farm Products Co., Inc. v. Baldwin*, 293 U.S.194, 209-213; *Chastleton Corp. v. Sinclair*, 264 U.S.543, 547-549; *Weaver v. Palmer Bros. Co.*, 270 U.S.402, 410;

Nashville C.&S.L.Ry. v. Walters, 294 U.S.405, 414-416; *Polk Co. v. Glover*, 305 U.S.5, 9-10.

Following conviction herein, petitioners moved in arrest of judgment, again alleging that 18 U.S.C. §1461, on its face and as construed and applied, violated the free speech, equal protection, due process and cruel and unusual punishment provisions, in violation of the First, Fifth, Sixth and Eighth Amendments [J.A. 11]. This motion was denied [J.A. 11].

In response to petitioners' attack on the vagueness of §1461, the court below said: "The language of Section 1461 does not offend constitutional safeguards . . ., or fail to give men in acting adequate notice of what is prohibited. Roth v. United States, 354 U.S. 476, at 491-492." (481 F.2d at 312). Two weeks later, this Court said, in *United States v. 12 200-Ft. Reels*, 413 U.S.123, 130, n.7: "If and when . . . a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material . . . we are *prepared* to construe such terms as limiting regulated material to" the kind mentioned in *Miller v. California*, 413 U.S.15, 24.[4] (Emphasis added).

In *Miller*, the Court recognized the need to "formulate standards more concrete than those in the past" (413 U.S. at 20). The need was manifest because the Court had formulated a variety of views on obscen-

[4]In *O'Shea v. Littleton*, ... U.S. ...., 94 S.Ct.669, Justice Blackmun stated that this Court is powerless to render an advisory opinion, citing *Hayburn's Case*, 2 Dall. 409 (1792); *United States v. Evans*, 213 U.S.297, 301 (1909); *Muskrat v. United States*, 219 U.S.346, 360-361 (1911); *Stearns v. Wood*, 236 U.S.75 (1915); *Coffmen v. Breeze Corps*, 323 U.S.316 (1945); *United Public Workers v. Mitchell*, 330 U.S.75 (1946); *Paschall v. Christie-Stewart, Inc.*, 414 U.S. ...., 94 S.Ct.312.

ity "unmatched in any other course of constitutional adjudication".

Following judgment herein, a different panel of the Ninth Circuit, after examining this Court's opinions of June 21, 1973, concluded that §1462 was, prior to June 21, 1973, "vague, ambiguous and essentially meaningless". *United States v. Henson*, ... F.2d ..... (9 Cir., No. 73-2063, Oct. 5, 1973).

A. At the time petitioners allegedly mailed the brochure in question, §1461 failed to provide "fair notice" or "concrete guidelines" as to what sexual expression was prohibited by the said statute.

1. Prior to June 21, 1973, §1461 Was Unconstitutionally Vague, Because It Failed to Contain a Description of the Sexual Conduct Miller Held Was Constitutionally Mandated and the Statute Had Not Received a Prior Authoritative Construction Reading the Necessary Terminology Into the Statute.

In *Miller*, 413 U.S. at 23-24, the Court said that "statutes designed to regulate obscene materials must be carefully limited. . . . As a result we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed." Subsequently, the Court said that under "the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice." (413 U.S. at 27). "Prerequisite" is defined as something

that is "required beforehand; necessary as a preliminary condition." Webster's Third New International Dictionary, Unabridged (G.&C. Merriam Co. 1967).

Justice Brennan, dissenting in *Paris*, stated that when an obscenity statute, such as the one at bar, failed to contain the required description of prohibited conduct, the statute could not stand.

> "While the Court's modification of the *Memoirs* test is small, it should still prove sufficient to invalidate virtually every state law relating to the suppression of obscenity. For under the Court's restatements, a statute must specifically enumerate certain forms of sexual conduct, the depiction of which is to be prohibited. It seems highly doubtful to me that state courts will be able to construe state statutes so as to incorporate a carefully itemized list of various forms of sexual conduct, and thus to bring them into conformity with the Court's requirements. Cf. *Blount v. Rizzi*, 400 U.S. 410, 419 (1971). The statutes of at least one State should, however, escape the wholesale invalidation. Oregon has recently revised its statute to prohibit only the distribution of obscene materials to juveniles or unconsenting adults. The enactment of this principle is, of course, a choice constitutionally open to every State even under the Court's decision." (413 U.S. at 95, n.13.)

The Chief Justice did not agree with Justice Brennan's views. "We do not hold . . . that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed *heretofore* or hereafter *may* well be adequate." (413 U.S. at 24, n.6.) (Emphasis added.) In discussing the kind of

statute he had in mind, the Chief Justice pointed to Oregon and Hawaii statutes "as examples of state laws directed at depiction of defined physical conduct, as opposed to expression. (*Id.*)

In its opinion affirming the judgment herein, the court below had no occasion to consider the impact of *Miller*, since its opinion was filed two weeks before *Miller* was decided.[5] Other courts have suggested, however, that the statute's deficiency could be saved by an authoritative retroactive construction. In *United States v. Thevis*, 484 F.2d 1149, 1155 (5 Cir. 1973), the Court stated: "On its face, this statutory terminology ['obscene, lewd, lascivious or filthy'] does not contain the specifics required by *Miller*. . . . *Miller* requires that elements of the definition be a part of the statute." Nevertheless, that court held that *Miller* could be read into the federal obscenity statute retroactively, saying: ". . . [I]n *12 200-Ft. Reels, supra*, at fn. 7, the Court states that it is 'prepared to construe such [federal statutory] terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller*. . . .' We believe that this answers the question and that the definition of *Miller* is a gloss properly added to [§1461] . . ." (484 F.2d at 1155). Such an approach, petitioners respectfully submit, is plainly erroneous.

When this Court stated that it was *prepared* to construe the vague terms "obscene, lewd, lascivious, filthy"

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[5]The case was argued on November 1, 1972. The opinion was filed on June 7, 1973. A member of the panel, Judge Jertberg, died on June 8, 1973, without having affixed his signature to the opinion. The Los Angeles Times (June 9, 1973) reported that Judge Jertberg had been "hospitalized with cancer" a few months before his death. See, 28 U.S.C. §46(b).

in accordance with *Miller*, the Court made clear that prior to June 21, 1973, there had been no such authoritative construction. In *Louisiana v. Shreveport News Agency, Inc.*, 287 So.2d 464 (Supreme Court of Louisiana, 1973), the court refused to read *Miller* into the Louisiana obscenity statute retroactively. The Louisiana obscenity statute, like §1461, used the general terms "obscene, lewd, lascivious". etc. In concluding that the Louisiana statute was unconstitutional because it did not contain a description of the specific sexual conduct an obscenity statute must contain if it is to meet constitutional requirements, Justice Barham, speaking for the court, said:

> ". . . [I]t must be obvious even to laymen and surely to this Court, that [the Louisiana obscenity statute] does not meet the guidelines and standards set forth by the United States Supreme Court in Miller v. California.
>
> "We are urged by the State, however, to take the two examples, which the Miller majority opinion suggests state legislatures might define for regulation of certain obscene materials, and to make them the obscenity statute for Louisiana. . . .
>
> "In United States v. 12 200 Ft. Reels of Super 8 mm. Film . . . the Chief Justice . . . stated in Footnote 7, in pure obiter dictum, that the Supreme Court was prepared to construe 'obscene', 'lewd', 'lascivious', 'filthy', 'indecent', or 'immoral', for the purpose of reviewing the constitutionality of the federal statutes . . . as being limited to 'specific hardcore' sexual conduct given as exam-

ples in Miller v. California. We are bound by the holdings of the United States Supreme Court. We are not bound by the passing remarks of the authors of the opinions from that Court. We are not of the opinion that we are endowed with the constitutional authority to re-draft Louisiana's obscenity statute. . . ." (287 So.2d at 468-469).

Even if the language in *12 Reels of Film* is more than pure *obiter dictum*, it certainly did not purport to have any retroactive effect. This Court has consistently held that the Judiciary is barred by the Due Process Clause from attempting to cure a vague statute by retroactive rulings, "either of the trial court or of the appellate court". The fundamental principle which requires a criminal offense to have existed when the conduct in issue occurred applies to bar "retroactive criminal prohibitions emanating from courts as well as from legislatures". *Bouie v. Columbia*, 378 U.S.347, 353, 354. See also, *Douglas v. Buder*, 412 U.S.430. Moreover, as the Court stated in *Blount v. Rizzi*, 400 U.S.410, 419: "[I]t is for Congress, not this Court, to rewrite the statute."

2. Prior to June 21, 1973, §1461 Was Unconstitutionally Vague, Because the Statute Was Authoritatively Construed as Requiring Proof That Charged Publications Offend National Standards, Which Nationwide Standards This Court Found Were Unascertainable, Unprovable and Nonexistent.

In *Miller*, the Court held that in a *state* obscenity prosecution, *a statewide standard* was sufficient to meet constitutional requirements, and a national standard need not be applied. But in a federal obscenity case a national standard must be used, both because Congress so intended and because the Constitution

probably requires it.[6] In *Manual Enterprises, Inc. v. Day*, 370 U.S.478, Justice Harlan said: "We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency. We need not decide whether Congress could constitutionally prescribe a lesser geographical framework for judging this issue which would not have the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency." (370 U.S. at 488). In a footnote at the same page, Justice Harlan stated: "The 1958 amendments to 18 U.S.C. §1461, . . . authorizing criminal prosecution at the place of delivery evince no purpose to make the standard less than national." See also, the testimony of Justice Rehnquist when he was Assistant Attorney General, Office of Legal Counsel, Department of Justice, at *Hearings Before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, Ninety-First Con-*

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[6]The Court on June 21, 1973 was mute on the question of whether nationwide standards are still required in federal obscenity prosecutions. In *United States v. Orito*, (413 U.S.139, 143, the Court incorporated the portion of *Miller* appearing in 413 U.S. at 23, and in *United States v. 12 Reels of Film* (413 U.S. at 130, n. 7), the Court incorporated the portion of *Miller* appearing in 413 U.S. at 25. These page references relate solely to the kind of sexual conduct which might be reached under a valid obscenity statute. The discussion of local vs. national standards occurs at 413 U.S. at 30-34, where the Court said that state standards were constitutionally sufficient in a state prosecution. In *United States v. Palladino*, ... F.2d .... (1 Cir. 1974), the court held that the utilization of "local" standards in a federal obscenity prosecution raised serious constitutional questions. Accordingly, that court adhered to its long-standing ruling that national standards must be utilized in federal criminal prosecutions.

gress, on H.R.5171, H.R.11009, H.R.11031, H.R. 11032, and related measures, Serial No. 21 (pp. 37-38, 46-47), where Justice Rehnquist expressed the view that a federal obscenity statute *had* to utilize national standards.[7]

In the case at bar, the jury was repeatedly instructed that it was required to judge the brochure by national standards. The jury was instructed that it was required to find that the brochure was patently offensive "in that it goes substantially beyond contemporary national community standards relating to the description or representation of sexual matters" [J.A. 238]. "You must measure the material by contemporary or current national community standards and determine whether the material . . . exceeds . . . representations of sex and nudity which are reasonably acceptable in the national community. . . . Contemporary community standards means the standards generally held throughout this country. . . ." [J.A. 241]. The jurors were instructed that they were "the sole judges of the contemporary community standards of this country" [J.A. 241], and that if they found that the publications substantially exceed the limits of candor "acceptable in the national community, then you may find the material to be patently offensive" [J.A. 242]. "[I]n determining and applying contemporary national standards, you must consider what appears generally in magazines, books, newspapers, television, burlesque, nightclubs, novels, motion pictures, the stage and other media of communications in the nation as a whole. . . ." [J.A. 243]. Finally, the jurors were told: "You apply the standards throughout the nation, what you

[7]This testimony is set forth in some detail as Appendix G, pp. 52-54, to the Petition for a Writ of Certiorari herein.

find the standards to be throughout the nation, I think is probably a better statement." [J.A. 250].

Once it is recognized that 18 U.S.C. §1461, as applied to petitioners herein, utilized a nationwide test, it becomes clear that the statute so applied is unconstitutionally vague. In *Miller*, the Court observed that our Nation is too big and too diverse for the Court to be able to articulate "a single formulation, even assuming the prerequisite consensus exists. To structure an obscenity prosecution around evidence of national community standards "would be an exercise in futility" (413 U.S. at 30). The Court found nothing in the First Amendment that requires a jury to consider "*unascertainable* 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact." (413 U.S. at 31-32) (emphasis added). In *Miller*, the Court cited with approval Chief Justice Warren's observations in *Jacobellis v. Ohio*, 378 U.S. 184, 200, that "there is no provable 'national standard'. . . . [I]n all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."

In *Ginzburg v. United States*, 383 U.S.463, 480, Justice Black, dissenting, stated that even if there was agreement as to the relevant community pursuant to which the obscenity of material is to be judged, "who is capable of assessing 'community standards' on such a subject? . . . So here again the guilt or innocence of a defendant charged with obscenity must depend in the final analysis upon the personal judgment and attitudes of particular individuals and the place where the trial is held." In *Winters v. New York*, 333 U.S.507, 514, this Court condemned as unconstitutionally vague

a state statute which, as construed, measured the criminality of publications by invoking the "experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order".

3. Prior to June 21, 1973, the Statute Was Authoritatively Construed as Requiring Proof That Charged Publications Appeal to the Prurient Interest of the Average Person in the Nation as a Whole, Which Test This Court Labeled "Unrealistic".

In *Miller*, the Court stated that under *Memoirs* a national standard of First Amendment protection enumerated by a plurality of this Court had to be used in determining what appeals to the "prurient interest". (413 U.S.15, 30). But in *Miller*, the Court rejected, for the future, the use of national standards in determining appeal to prurient interest, saying there are no "fixed uniform national standards of . . . what appeals to the 'prurient interest'. . . . When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient', it would be unrealistic to require that the answer be based on some abstract formulation."

Justice Black, dissenting in *Ginzburg v. United States*, 383 U.S.463, 478-479, said of the "prurient interest" test: "[I]t seems quite apparent to me that human beings serving . . . as judges or jurors, could not be expected to give any sort of decision on this element which would even remotely promise any kind of uniformity in the enforcement of this law. What conclusion an individual . . . would reach about whether the material appeals to 'prurient interest in sex'

would depend . . . upon the [individual's] . . . personality, habits, inclinations, attitudes and other individual characteristis. . . . In the final analysis, the submission of such an issue as this to a judge or jury amounts to practically nothing more than a request for the judge or juror to assert his own personal beliefs about whether the matter should be allowed to be legally distributed. . . ."

4. Prior to June 21, 1973 §1461 Was Unconstitutionally Vague Because It Utilized an Unworkable and Ambiguous Test—the "Utterly Without Redeeming Social Value" Test.

In connection with the "utterly without redeeming social value" test, Chief Justice Burger spoke of the "intractable obscenity problem" (*Miller*, 413 U.S. at 16) and the "variety of views among the members of the Court unmatched in any other course of constitutional adjudication" (*Id.* at 22). Quoting Justice Harlan, the Court wondered if the " 'utterly without redeeming social value' test had any meaning at all" (*Id.* at 22). The *Memoirs* test, the Court said, has been abandoned as "unworkable by its author and no member of the Court today supports the *Memoirs* formulation" (*Id.* at 23). The Court also rejected "the ambiguous concept of 'social importance'. See, *Memoirs v. Massachusetts*, 383 U.S. at 462 . . . (White, J., dissenting)." (*Id.* at 25, n.7). Justice White had suggested in *Memoirs* that the concept of "social value" was essentially meaningless, saying: "[W]hy shouldn't the fact that some people buy and read such material prove its 'social value'?"

Speaking of the "redeeming social value" test, Justice Black, dissenting in *Ginzburg*, 383 U.S. at 480, said:

"This element seems to me to be as uncertain, if not even more uncertain, than is the unknown substance of the Milky Way. If we are to have a society as contemplated by the Bill of Rights, then I find little defense for leaving the liberty of American individuals subject to the judgment of a judge or jury as to whether material that provokes thoughts or stimulates desire is 'utterly without redeeming social value. . . .' Whether a particular treatment of a particular subject is with or without social value in this evolving, dynamic society of ours is a question upon which no uniform agreement could possibly be reached among politicians, statesmen, professors, philosophers, scientists, religious groups or any other type of group. A case-by-case assessment of social values by individual judges and jurors is, I think, a dangerous technique for government to utilize in determining whether a man stays in or out of the penitentiary."

In *Stanley v. Georgia*, 394 U.S.557, 566, the Court, citing *Winters v. New York*, 333 U.S.507, stated that it is irrelevant "that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all." In *Winters v. New York*, 333 U.S. at 510, the Court rejected the suggestion that the constitutional protection for a free press applies only to the exposition of ideas. "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement teaches another's doctrine.

Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." The Court, in declaring the New York statute there involved unconstitutionally vague, quoted from a New Jersey case as follows:

> ". . . That the terms 'hatred,' 'abuse,' 'hostility,' are abstract and indefinite admits of no contradiction. When do they arise? Is it to be left to a jury to conclude beyond reasonable doubt when the emotion of hatred or hostility is aroused in the mind of the listener as a result of what a speaker has said? Nothing in our criminal law can be invoked to justify so wide a discretion. The Criminal Code must be definite and informative so that there may be no doubt in the mind of the citizenry that the interdicted act or conduct is illicit." (333 U.S. at 517).

See also, *Burstyn v. Wilson*, 343 U.S.495, 501; *Cohen v. California*, 403 U.S.15, 24, 26.

5. Prior to June 21, 1973, §1461 Was so Vague, Ambiguous and Unworkable That This Court Was Required to Adopt the Redrup Approach of Deciding Each Case on an Ad Hoc Basis, Without Attempting to Offer Guidance to Those Subject to the Provisions of the Statute.

In *Miller*, Chief Justice Burger said that in view of the unworkability of the *Roth-Memoirs* test "this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. *Redrup v. New York*, 386 U.S.767. . . .

Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* 'policy'. See *Walker v. Ohio*, 398 U.S.434, 434-435 . . . (dissenting opinions) (1970). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." (413 U.S. at 22, n.3).

Justice Brennan, dissenting in *Paris*, 413 U.S. at 82, made the same point, saying: "In the face of this divergence of opinion the Court began the practice in 1967 in *Redrup v. New York*, 386 U.S.767, of *per curiam* reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene." After stating that the Court had failed to formulate a satisfactory standard for separating protected from unprotected speech, Justice Brennan went on to say that out of necessity the Court "resorted to the *Redrup* approach, which resolves cases as between the parties, but offers only the most obscure guidance to legislation, adjudication by other courts, and primary conduct. By disposing of cases through summary reversal or denial of certiorari we have deliberately and effectively obscured the rationale underlying the decision. It comes as no surprise that judicial attempts to follow our lead conscientiously have often ended in hopeless confusion." (413 U.S. at 83).

Our Constitution, of course, requires fair notice so that the law-abiding can conform their conduct to the requirements of the law. But how were the petitioners, law-abiding citizens, to know what publications dealing with sex would be found obscene by five

of the Justices "subjectively judging" the publications "applying their separate tests"? If judges, attempting to follow this Court's lead conscientiously, "have often ended in hopeless confusion", was not petitioners' plight even more hopeless?

In *Grayned v. City of Rockford*, 408 U.S.104, 108-109, this Court said: "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning."

In the case at bar, petitioners, law-abiding persons, have been trapped by being convicted under a statute which no man, not even the most learned Justice can understand.

B. In three cases decided since *Miller*, the respective Circuits concluded that a conviction obtained under the *Roth-Memoirs* standards could not stand in light of *Miller v. California*. In *United States v. Friedman*, ... F.2d .... (10 Cir. Nos. 72-1143-1144, December 11, 1973), the court had before it convictions and sentences for violations of 18 U.S.C. §1465(2) after a jury trial. The court vacated the cause, saying: "It is our view that the several recent decisions of the Supreme Court requires a reconsideration of the standards applicable to cases of this nature." After citing *Miller* and the related cases, the court concluded: "These decisions, in our opinion, require a re-examination of the facts of this case together with a determination of what may be the applicable standards." In *United States v. Palladino*, ... F.2d .... (1 Cir. No. 72-1005, Jan. 5,

1974), the court also dealt with a federal obscenity conviction by a jury prior to June 21, 1973. In reversing the conviction, the court said the "defendants are caught in a period of transition, their prosecutions having taken place before the Miller decisions. They cannot fairly be subjected to penalties for violation of rules established after their actions." In *United States v. Henson*, ... F.2d .... (9 Cir., No. 73-2063, Oct. 5, 1973), the court said, after referring to this Court's decisions of June 21, 1973: "[T]he Supreme Court issued a series of opinions in which its prior definitions of obscenity were in part repudiated and in which some elements of the previously existing tests applied by the District Court . . . were generally characterized as vague, ambiguous or essentially meaningless."

In the case at bar, petitioners have been indicted and tried under a statute which, as interpreted prior to June 21, 1973, was "essentially meaningless". The judgments of conviction thereunder cannot stand.

II.

In Light of This Court's June 21, 1973 Rulings the Indictment Herein Is Fatally Defective Because It Failed to Inform Petitioners of the Nature and Cause of the Accusations Against Them in Violation of the Provisions of the Sixth Amendment.

In *United States v. Orito*, 413 U.S.139, 145, this Court vacated the judgment of the District Court and remanded the case "for reconsideration of the *sufficiency of the Indictment* in light of *Miller v. California . . .; United States v. Twelve 200 Ft. Reels* . . . and this opinion." (Emphasis added).

The necessity of examining the sufficiency of the Indictment herein flows naturally from this Court's

recognition that neither the words of the statute standing alone ("obscene, lewd, lascivious, indecent, filthy and vile") nor the gloss put on these amorphous words by *Roth-Memoirs* gave sufficient notice of the offense charged. The counts of the Indictment upon which petitioners stand convicted are solely in statutory language [See, *e.g.*, J.A. 17]. The Indictment does not contain a description of the specific sexual conduct *Miller* held the Due Process Clause requires. Nor does the Indictment limit the statutory terminology to works which, "taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value." (*Miller*, 413 U.S. at 24). Petitioners moved to dismiss the Indictment because, *inter alia*, it failed to allege the essential elements of obscenity and therefore failed to state facts sufficient to constitute an offense against the United States. The trial court denied the motion and also denied petitioners' motion in arrest of judgment filed after the convictions herein [J.A. 273]. The court below affirmed, saying that an indictment in statutory language "is not indefinite or vague and the use of statutory language in an indictment is sufficient. . . . Hopkins v. United States, 405 F.2d 770 (9 Cir. 1969)." (481 F.2d at 312). In *Hopkins*, the court stated that, at most, a charge in statutory language "could be considered ambiguous. Had counsel thought it so, he could have asked for a bill of particulars, Rule 7(f), F.R.Crim.P." (405 F.2d at 772). In the case at bar, petitioners did ask for a bill of particulars, but the Government's bill not only failed to clarify the charge but made it more confusing. More importantly, however, *Russell v. United States*,

369 U.S.749, 770, teaches that a bill of particulars cannot save an invalid indictment:

> "To allow the prosecutor, or the Court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicated him."

Russell holds that in an indictment upon a statute, *it is not sufficient to set forth the offense in the words* of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished (369 U.S. at 765-766). See also, *United States v. Carll*, 105 U.S.611, 612. Every member of the Court concedes that the statutory language of §1461, standing by itself, is unconstitutionally vague and broad. It follows that the mere use of the statutory terminology—which is all we have in the case at bar—fails to set forth "all the elements necessary to constitute the offense" intended to be punished by §1461. In *Russell*, the Court explored the purpose served by a grand jury indictment in the administration of federal criminal law, concluding that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation", and that "the constitutional provision that a trial may be held in a serious federal criminal case only if a grand jury had first intervened reflects centuries of antecedent development of common law" (369 U.S. at 761). In the case

at bar, the Indictment failed to inform petitioners of the charges against them. Moreover, it is clear that the Grand Jury never returned an indictment which confined the vagrant language of §1461 within constitutional limits.

Where, as here, guilt or innocence depends so crucially upon the meaning given to the words "obscene, lewd, lascivious, indecent, filthy or vile", the indictment must do more than simply repeat the vague language of that criminal statute. "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars. . . . An indictment not framed to apprise the defendant with reasonable certainty of the nature of the accusation made against him . . . is defective, although it may follow the language of the statute." (369 U.S. at 765). The Court noted that "these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7 (c) of the Federal Rules of Criminal Procedure. . . ." (369 U.S. at 765-766). Where, as in the case at bar, the statutory language does not encompass all the elements of the offense, an indictment which merely repeats the statutory language requires the accused "to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of his conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion . . . to condemn such a practice in a quite different factual

setting. *Cole v. Arkansas*, 333 U.S.196, 201, 202." (369 U.S. at 766).

This principle has special application to obscenity prosecutions, where uncertainty as to the meaning of the term "obscene" has characteristically infected criminal proceedings under §1461. As the Court said in *Russell:* "Difficult and doubtful questions are inherent in the judicial process, particularly under a system of criminal law which places heavy emphasis upon the protection of the rights and the liberties of the individual. . . . [A] proliferation of doubtful issues which not only burden the judiciary, but, because of uncertainties inherent in their resolution, work a hardship upon both the prosecution and the defense in criminal cases, is hardly a desideratum. . . . [T]he repeated appearance in prosecutions under a particular criminal statute of the same critical and difficult question, which could be obviated by a simple averment in the indictment, invites inquiry into the purposes and functions which a grand jury indictment is intended to serve." (369 U.S. at 760).

In *Russell*, the Court stated that at every stage in the criminal proceeding the accused "was met with a different theory, or by no theory at all. . . . Far from informing [him] of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal" (369 U.S. at 769), and spoke of the difficulties and uncertainties which the federal trial and reviewing courts had in dealing with cases arising under the statute there involved. "Viewed in this context", the Court said the rule that an indictment must

contain more than mere statutory language "is designed not alone for the protection of the defendant, but for the benefit of the prosecution as well, by making it possible for courts called upon to pass on the validity of convictions under the statute to bring an enlightened judgment to that task." (369 U.S. at 769).

Federal trial courts and reviewing courts have had even greater difficulties and uncertainties in dealing with cases arising under §1461.

In *United States v. Vuitch*, 402 U.S.62, the trial court dismissed an indictment charging the commission of an abortion, on the ground that the statute was unconstitutionally vague. This Court reversed, concluding that the statute, properly construed, was not unconstitutionally vague. The Court stated, however, that under the statute "the burden is on the prosecution to *plead and prove* that an abortion was not 'necessary for the preservation of the mother's life or health'" (402 U.S. at 71) (Emphasis added).

In *Rabe v. Washington*, 405 U.S.313, the Court held that a state obscenity statute, construed as prohibiting the showing of a sexually oriented movie in a drive-in theatre, which movie might be exhibited to adults in an indoor theatre with impunity, was impermissibly vague for failure to give the accused fair notice that criminal liability was dependent upon the place where the film was shown. Chief Justice Burger, joined by Justice Rehnquist, concurred, saying:

> ". . . That this record shows an offensive nuisance that could properly be prohibited, I have no doubt, but the statute and *charge did not give the notice constitutionally required.*" (405 U.S. at 317) (emphasis added).

Circuit and district courts have uniformly invalidated indictments containing ambiguities less gross than those found in the case at bar. See, *United States v. Leonard*, 455 F.2d 949, 950 (9 Cir. 1972); *United States v. Fiorito*, 465 F.2d 431, 432 (7 Cir. 1972); *Nelson v. United States*, 406 F.2d 1136 (10 Cir. 1969); *United States v. Beard*, 414 F.2d 1014 (3 Cir. 1969); *United States v. Little*, 317 F.Supp.1308 (D.C. Del. 1970); *United States v. Farinas*, 299 F.Supp.852 (D.C. N.Y. 1969); *United States v. Schneiderman*, 102 F. Supp.87 (D.C. Cal. 1951).

The central fact that emerges from the June 21, 1973 decisions is that the statutory language of §1461, and the gloss put on that language by *Roth-Memoirs*, failed to give petitioners the constitutionally required notice. The Indictment, which merely repeated the defective statutory language was, therefore, fatally infirm.

III.

The Provisions of Title 18 United States Code §1461, on Their Face and as Construed and Applied to Authorize the Jury to Measure the Prurient Appeal of the Brochure by Its Impact on Undefined Sexually Deviant Groups Rather Than Solely by Its Impact on the Average Person in the Nation as a Whole, Violated the Free Speech and Press Provisions of the First Amendment and the Due Process Provisions of the Fifth Amendment.

The court below conceded that petitioners were "correct" in their contention that the brochure had to be measured solely by its impact on the average person and not by its impact on any sexually deviant groups (481 F.2d at 320-321). Indeed, no other conclusion was possible in light of the Government's bill of par-

ticulars asserting that the charge in the Indictment was that the brochure herein appealed to the prurient interest of the average person [J.A. 45-46]. The court below concluded, however, that the trial court had not committed reversible error in instructing the jury that it could measure the brochure by its appeal to the prurient interest of the average person *or* its appeal to the prurient interest of a clearly defined deviant group, and in permitting the Government expert to testify that certain pictures appealed to the prurient interest of various sexually deviant groups.

A. The Trial Court Committed Reversible Error and Rendered §1461 Unconstitutionally Vague and Broad When It Instructed the Jury That It Could Measure the Brochure by Its Appeal to the Prurient Interest of the Average Person or Its Appeal to the Prurient Interest of Undefined Sexually Deviant Groups.

The court below concluded that when the instructions "are taken as a whole" the jury was properly instructed to measure the brochure solely by its appeal to the prurient interest of the average person. (481 F.2d at 321). According to the court below, the trial court was attempting to "avoid confusion" and to make perfectly clear that the brochure was to be measured solely by its prurient interest to the average person when it instructed the jury as follows:

> ". . . the prurient interest requirement may, also, be assessed in terms of sexual interests of the intended or probable recipient group . . . (which) must be a clearly defined sexually deviant group. . . . I suppose one clearly defined would be homosexuals.
>
> "There are depicted throughout the materials under consideration, various sexual activities that

may or may not be found to be deviant, that may have prurient appeal, depending upon the particular sexual interest of the viewer, whether normal or deviant. . . .

"Consequently, if you find that some of the material appeals to the prurient interest of the average person, and some of the material appeals to the prurient interest of a deviant sexual group, that fact would not preclude your finding that the dominant theme of the material taken as a whole is, generally speaking, one of an appeal to the prurient interest, as has been previously defined in the broad sense." (See, 481 F.2d at 321-322).

A brief examination of the record in addition to a simple reading of the above quoted instruction demonstrates that the court below was in error. At the jury conference, the court's initial proposal for instructing on prurient interest read in relevant part as follows:

"Prurient interest is a shameful or morbid interest in sex or nudity and you must measure that appeal by the average or ordinary adult."

The court then advised counsel that it was going to make an addition by changing the period to a comma and adding the following:

". . . or by a clearly defined deviant group, as explained elsewhere." [R.T. 4482].

That is the way the court instructed the jury [J.A. 239].

When the court advised counsel that it was going to instruct on deviant groups, petitioners objected strenuously [R.T. 4483], pointing out that the court would never be able to define what "the clearly defined sexu-

ally deviant group is, because there has been no evidence on it and it is going to be pure speculation, and it would render the statute as applied unconstitutional. . . ." [R.T. 4484]. Petitioners expressed open disbelief when the court stated that it intended to advise the jury that "the prurient appeal requirement may *also* be assessed in terms of sexual interest of the intended or probably recipient group" [R.T. 4485] (emphasis added). To so instruct the jury, petitioners argued, would render "the statute unconstitutionally vague in a sense that is unbelievable, and it is not supported by the evidence. It is wrong and it is confusing and it is impossible to work with and it is an instruction that [petitioners] object to vigorously." [R.T. 4486].

Petitioners also objected in writing to the proposed charge [C.T. 918, 920, 921, 933-934], pointing out that giving the instruction on the appeal to sexually deviant groups "is a blatant return to the *Hicklin* test which was condemned as being unconstitutionally restrictive in *Roth*" [C.T. 934]. Finally, after the trial court instructed the jury, petitioners, in compliance with Rule 30, objected to the charge which left the jury free to return a verdict of guilt even if the brochure did not appeal to the prurient interest of the average person [J.A. 262]. See, *Stromberg v. California*, 283 U.S.359. The instruction was contrary to the principles enunciated in *Roth*, *Memoirs*, *Mishkin* and *Miller*. As construed by the said instruction, §1461 was rendered unconstitutionally vague and broad.

B. The Trial Court Committed Reversible Error When It Permitted the Government to Adduce Evidence That Pictures Which Appeared Both in The Illustrated Report and the Brochure Appealed to the Prurient Interest of Sexually Deviant Groups.

Over the continuing and strong objections of petitioners [J.A. 148, 158-163; R.T. 1696, 1701, 1739-1745], the Government's alleged expert psychiatrist was permitted to testify that certain pictures found in both *The Illustrated Report* and the brochure appealed to the prurient interest of sexually deviant groups. The trial court, in permitting testimony with respect to the appeal of the material to a sexually deviant group, stated that it did not know what the "Supreme Court" meant "by the average man". [R.T. 1747, 1749].[8] The court below assumed that the opinion testimony of the Government's psychiatrist constituted a variance of proof under the Government's answer to the bill of particulars, but stated that this was not prejudicial because his testimony with regard to sexually deviant groups was directed to the charged *The Illustrated Report* and the sole direct testimony concerning the brochure was that it had an appeal to "pruriency" (481 F.2d at 321) and because petitioners' own experts allegedly covered the same field (481 F.2d at 322).

The court below was in error on both counts. The specific pictures which the Government's psychiatrist testified appealed to the prurient interest of sexually deviant groups *were the same pictures* as those appearing

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[8]In *Miller*, the Court said: "[T]he primary concern with requiring the jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible . . . person. . . ." (413 U.S. at 33).

in the brochure. [R.T. 1697, 1698, 1700-1703, 1708-1709]. Thus, the jury was told by the Government's witness that the pictures in the brochure appealed to the prurient interest of sexually deviant groups.

In stating that the testimony of the Government's psychiatrist was not prejudicial because the petitioners' expert allegedly covered the same field, the court overlooked the fact that petitioners at the trial, before asking their own expert whether the material appealed to the prurient interest of any sexually deviant group, specifically requested the trial court to strike the Government's testimony concerning the appeal of certain pictures to sexually deviant groups and to limit the trial to the impact of the material upon the "average person". It was only when the court refused to limit the testimony that petitioners were compelled to meet the Government's testimony by their own witnesses [J.A. 158-163].

C. The Trial Court Committed Reversible Error in Failing to Instruct the Jury, as Requested by Petitioners, That "Prurient Interest" Must Be Measured by Nationwide Standards.

In *Miller*, the Court stated that under *Memoirs* a national standard of First Amendment protection had to be used in determining what appeals to the "prurient interest" (413 U.S. at 30). In this regard, petitioners asked the trial court to instruct the jury as follows [C.T. 736]:

> "If the material does not appeal to your prurient interest, you may take that fact into account in determining whether it appeals to the prurient interest of the average person, in the Nation as a whole. But you must bear in mind that even if the material may appeal to your prurient interest,

that does not mean it appeals to the prurient interest of the average person, in the Nation as a whole. The evidence in this case establishes that we are a pluralistic society and that sexual material does not have a uniform impact upon people. Rather, the same material may have a quite different effect upon persons, depending upon age, sex, education, religion, marital status and the like." [See also, C.T. 915, 918, 919, 920].

The trial court refused to give this instruction and never advised the jury that it was required to measure the "prurient appeal" of the material by national standards. Indeed the jury was never told by what standards it was to measure the "prurient appeal" of the brochure. The jury was thus left up in the air as to whether to measure the prurient appeal of the brochure by "world-wide, nation-wide, section-wide, state-wide, country-wide, precinct-wide or township-wide" standards. See, *Ginzburg v. United States,* 383 U.S.463, 480 (Black, J., dissenting).

In *United States v. Klaw,* 350 F.2d 155, 165 (2 Cir. 1960), the court said:

". . . Assuming that 'prurient appeal' can be adequately defined, there are still some questions: appeal to whose prurient interest? judged by whom? on what basis? For example, is it the 'average person' who applies 'contemporary community standards' to determine if the 'dominant theme' appeals to 'prurient interest' (of someone)? Or is it someone else applying 'contemporary community standards' to determine that the 'dominant theme' appeals to 'prurient interest' of the 'average person'? Do 'contemporary community

standards' operate to reduce potential prurient appeal? Or do they operate to establish that some 'redeeming social importance' is present? Or, do they operate to measure the 'patent offensiveness' of an excess of candor? Again, does the 'dominant theme, indicate that the prospective prurient appeal is great or slight? Or does it suggest that other themes will supply the redeeming social importance? . . ."

The trial court's failure to instruct on the appeal of the "prurient interest" of the brochure measured by national standards, as it was required to do under *Memoirs*, and its erroneous instruction regarding the appeal of the brochure to "sexually deviant groups", rendered the statute unconstitutionally vague and broad.

IV.

The Provisions of Title 18 United States Code §1461, on Their Face and as Construed and Applied, Violate the Free Speech and Press Provisions of the First Amendment and the Due Process Provisions of the Fifth Amendment, Because the Trial Court Instructed the Jury That It Could Find the Brochure Obscene Even if the Brochure Did Not Meet the Roth-Memoirs Test if the Jury Found "Pandering", Notwithstanding the Fact That Neither the Statute nor the Indictment Fairly Advised Petitioners That They Were Charged With Pandering.

Petitioners were convicted of "pandering" a brochure, although the Indictment did not allege pandering in any form. At the commencement of the trial, petitioners insisted that pandering could not be part of

the Government's case since it was not charged in the Indictment [R.T. Vol. D, 43-46; R.T. Vol. E, 60]. Petitioners sought, unsuccessfully, to require the Government to elect whether it was charging the material with being obscene *per se*, or whether it was charging "pandering" [R.T. Vol. E, 63, 67, 70]. At trial, there was absolutely *no* evidence that the brochure, found obscene by the jury, was "pandered". Nevertheless, the trial court, over petitioners' objections, instructed the jury extensively on pandering. The jury was instructed that it was not limited to the brochure itself [J.A. 245]; that even if the brochure did not meet the threefold test, the jury was free to find it obscene if it found that the brochure was "produced and sold as stock in trade of the business of pandering" [J.A. 245]. Pandering, the jury was told, "is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer. It is a deliberate representation of publications as erotically arousing, an attempt at titillation, rather than saving intellectual content" [J.A. 245]. Pandering evidence, the jury was told, "is pertinent to all three elements of the basic test of obscenity" [J.A. 245].

Petitioners objected to the court giving a pandering instruction upon the grounds that it was constitutionally impermissible, misleading, inaccurate, highly prejudicial and confusing, and failed to state the applicable law of the case [C.T. 926]. Petitioners also submitted that a pandering instruction could not be given since the Grand Jury which returned the Indictment did not allege pandering and the giving of such an instruction would render the statute, as construed and applied, unconstitutional, in violation of the free speech, due

process and Grand Jury provisions of the First and Fifth Amendments [C.T. 926].

Petitioners pointed out that in *United States v. Pinkus*, 333 F.Supp.928 (C.D. Cal. 1971), the court held that the Government was barred from attempting to utilize the "pandering" doctrine announced in *Ginzburg v. United States*, 383 U.S.463, if the Indictment failed to allege pandering. "It is fundamental that a defendant cannot constitutionally be convicted of an offense not charged in the indictment. . . . I adhere to the principle that a person is entitled to be informed of what he is being prosecuted for having done. If proof of pandering is to make a difference as to obscenity [the] defendant must first be charged in the indictment with such pandering." (333 F.Supp. at 932).

The pandering instruction, petitioners argued, should not be given in light of the enactment by Congress of 39 U.S.C. §3008, found constitutional in *Rowan v. United States Post Office Dept.*, 397 U.S.728 since that statute provided that "pandering advertisements" could be sent through the mail until such time as an offended addressee requested the Post Office Department to issue an order prohibiting further mailings [C.T. 926].

Petitioners also argued that a pandering instruction, if it was to be given at all, would have to be limited to Counts 19, 20 and 21 (which alleged that the book was obscene), since an advertisement could not pander itself [C.T. 926].

At the time of the pre-jury instruction conference, petitioners objected to the portion of the pandering charge which stated that pandering is pertinent to all three elements of the test. Pandering, petitioners ar-

gued, "applied at most to its impact upon 'social value'" [R.T. 4498].

The importance of the pandering instruction in the case at bar can be seen from the fact that after the jury had begun its deliberation, it requested the court to reread its instructions on obscenity *and pandering* [R.T. 4989-4990]. Petitioners again objected to the giving of the "pandering" instruction [R.T. 5012-5013].

In 1967, Congress enacted 39 U.S.C. §3008 entitled "Prohibition of Pandering Advertisement in the Mails". That Section provides a procedure whereby any householder may insulate himself from advertisements that offer for sale matter "which the addressee in his sole discretion believes to be 'erotically arousing or sexually provocative'" [39 U.S.C. §3008(a)]. This statute was found to be constitutional. *Rowan v. United States Post Office Dept.*, 397 U.S.728. In *Rowan*, the Court said that the statute was intended to remove the right of the Government to involve itself in any determination of the content and nature of "objectionable materials" (397 U.S. at 733). The legislative history of the statute discloses that its provisions were "not intended to prohibit" pandering material from being sent through the mails, "if the individual to whom it is addressed wishes to receive it." Report of the Senate Post Office and Civil Service Commission [Senate Report, No. 801]; 2 U.S.C. Cong. and Adm. News (90th Cong. First Sess. 1967), page 2295.

In the case at bar, the evidence reveals that each addressee who testified requested and obtained a prohibitory order pursuant to 39 U.S.C. §3008. They each testified that thereafter they never received any further advertisements from any of the petitioners. In

short, the evidence shows that 39 U.S.C. §3008 fulfilled its function [J.A. 101-123].

Petitioners submit that Congress, having authorized the initial mailing of "pandering advertisements", the Government cannot now attempt to prove that petitioners violated 18 U.S.C. §1461 because they allegedly mailed such advertisements.[9] To so construe and apply 18 U.S.C. §1461 would render it unconstitutional. *Rabe v. Washington*, 405 U.S.313. In this connection, petitioners asked the court to instruct the jury that Congress had passed a law which recognized that it is not a criminal offense to mail unsolicited sexual advertisements; that the law assumes that there will be people who desire to receive such advertisements and people who do not desire to receive them; that the law secures the right of all persons, including the petitioners, to mail such advertisements to persons who desire to receive them; that with regard to those who do not desire to receive them, the remedy Congress chose was to have the Postmaster General order the mailer to discontinue such mailings to those persons who have asked for a prohibitory order. Finally, petitioners requested the court to instruct the jury that it was not free to find petitioners guilty under the Indictment herein "merely because you may find that the [petitioners] . . . have mailed unsolicited sexually oriented advertisements to persons who did not desire to receive such advertisements." [J.A. 71-72]. The court refused to so instruct the jury.

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[9]Petitioners deny that the brochure was, in any event, a "pandering" advertisement. The brochure does not "proclaim" the book it advertises to be obscene. Instead, the text of the brochure asserts the very opposite. The entire purport of the brochure is that *The Illustrated Report* furthers knowledge and understanding of an important social issue.

In *United States v. Pellegrino*, 467 F.2d 41 (9 Cir. 1972), the court held that an advertisement cannot pander itself where, as here, it fairly and accurately describes the book it advertises. The court stated:

> "Appellant contends that pandering in the *Ginzburg* sense is never relevant to the question of whether advertising in itself is obscene, since advertising does not 'pander' itself. *Ginzburg*, it is argued, did not make pandering a distinct offense. The Court there was considering the obscenity of the advertised works themselves in the context of their promotion. Here the question, appellant asserts, is whether the advertising, standing alone, is obscene. The only 'context' is the material itself which speaks for itself. There is no occasion to give consideration to other material for the light it can shed on the nature of the material in question.
>
> "We agree that in the case of advertising the fact that such material constitutes or includes pandering does not serve the purpose of enlightenment served in *Ginzberg*. . . ." (467 F.2d at 46).

The text of the brochure herein is set forth in the opinion of the court below (481 F.2d at 316). The first page is an exact replica of the book it advertises, except for the words "THE ALL-AMERICAN COP-OUT". Those words have reference to the fact, also mentioned in the brochure, that the President had dismissed the facts set forth in *The Commission Report* "out of hand". There is not a word in the text which seeks to sell the book by an appeal to the "erotic interest" of the customers. The text of the brochure is

not on the "sexually provocative aspects" of *The Illustrated Report.*

Notwithstanding the fact that the brochure neither pandered itself nor the book it advertised, the court below erroneously held that it was proper to instruct the jury that the brochure could pander itself (481 F.2d at 323). In this the court was in error. See, *United States v. Books, Inc.*, 388 U.S.449, rvsg. 358 F.2d 935 431 F.2d 272 (9th Cir. 1970). See also, *United States v. Palladino*, 475 F.2d 65, 71 (1 Cir. 1973); *Spinar v. United States*, 440 F.2d 1241 (8 Cir. 1971); *Luros v. United States*, 389 F.2d 200 (8 Cir. 1968).

V.

The Brochure at Issue Is Protected by the Free Speech and Press Provisions of the First Amendment to the United States Constitution. It Is Neither Obscene in Fact nor in Law.

The government witnesses and petitioners' witnesses agreed that the brochure herein is intimately linked to the book it advertises. The Government's alleged expert on social value referred to the brochure as "a kind of a miniature of the book itself" [R.T. 2372]. Petitioners' witnesses on social value each expressed the view that the brochure has social value in part because it advertises an important book. As the court below observed, the opinions of petitioners' experts were "that the Report with its illustrations had great social value, and four of the experts testified that in their opinion the Brochure had redeeming social value and was not obscene" (481 F.2d at 311).

As heretofore noted, the jury did not agree with the Government's contention that *The Illustrated Report* was obscene. Indeed it could reach no decision with

regard to *The Illustrated Report*. Since all communications are presumed to be protected by the First Amendment until found to be outside such protection, *The Illustrated Report* is presumptively protected expression. In response to petitioners' argument that the brochure is protected by the First Amendment because it is a fair and accurate advertisement for a constitutionally protected book, the court below replied: "The premise is false. . . . If there be a presumption of the protection of the Report then a query of the bona fides of the Brochure as a protected advertisement is in order." (481 F.2d at 315). The court recognized that a different panel of the Ninth Circuit, in *United States v. Pellegrino*, 467 F.2d 41 (9 Cir. 1972), held that a brochure containing pictures which the court below believed were "hard core pornography" (481 F.2d at 320) was nevertheless protected, because the "obscene" pictures were "presented as illustrating various aspects of the book's claimed contributions to general knowledge. . . ." The court below sought to distinguish *Pellegrino*, saying that "the advertised Report as well as the advertising Brochure are under charge of obscenity. While we are not dealing with the charges against the Report on this appeal, it is considered necessary to place it in some context with the Brochure." (481 F.2d at 315). The court then stated that unlike the *Pellegrino* brochure the portrayals in the brochure herein "are not accompanied by any text and do not purport to be related to any material in the Report." (481 F.2d at 315-316). The court below was of the opinion that "whatever bona fide advertising attributes the *Pellegrino* brochure may have had the Brochure here has none. . . . It was for the jury to determine whether the Brochure had any

redeeming social value to justify its own position." (481 F.2d at 317). The court concluded that petitioners' claim "that the Brochure is inseparable from the Report is untenable and as such loses any constitutional protection as a legitimate advertisement of an asserted protected book." (481 F.2d at 317).

Initially, it should be observed that every picture in the brochure was also in *The Illustrated Report*. As heretofore stated, the Government stipulated that every picture in *The Illustrated Report* was related to the text of the official *Report;* and that pictures similar to those appearing in *The Illustrated Report* were used in various research activities that the Commission undertook [J.A. 163-166]. That the official *Report* of the Commission is itself of great political and social value cannot be disputed. *The Illustrated Report* has similar political and social importance. See, *e.g.*, Judge Aldrich's reference to *The Illustrated Report* in *United States v. Palladino*, 475 F.2d 65, 75-76, n.1 (1 Cir. 1973). The record herein establishes that *The Illustrated Report* with its pictures is more valuable than the official *Commission Report*. One of petitioners' witnesses, Commissioner Otto N. Larsen, Chairman of the Effects Panel of the Commission, testified that the illustrations enhanced the value of the *Report;* that the illustrations made clear what the *Report* was discussing and made it easier for persons to make judgments as to the recommendations made by the Commission [R.T. 4229-4286]. Dr. Cody Wilson, Executive Director and Director of Research of the Commission, also testified that *The Illustrated Report* was more valuable than the official *Report*, precisely because of the pictures contained in *The Illustrated Report* [R.T. 3354].

In *United States v. Palladino*, 475 F.2d 65 (1 Cir. 1973), vacated 413 U.S.916, the court held that an advertisement for a work entitled "The Photographic Deck of Sexual Love" was protected as a matter of law upon the jury finding that the advertised work was not obscene. "[S]ince the jury here necessarily held the advertisement for 'The Photographic Deck of Sexual Love' not obscene" by reason of the fact that it held the advertised work not obscene, "the government may not again introduce [the advertisement] into evidence to establish the crime of mailing obscene matters." (475 F.2d at 74). Following remand, the First Circuit reversed the judgment of conviction, ... F.2d .... (1 Cir. 1974, No. 72-1005). Concerning the advertisement for the "Photographic Deck of Sexual Love", the court said: "[W]e retain the ruling that because the jury held 'Photographic Deck of Sexual Love' to be non-obscene, consistency requires that the advertisement (which contained a partial presentation of the same photographs) be non-obscene as well".

A. The Record Establishes That the Brochure Has Social Value and Serious Political Value.

The brochure fairly and accurately advertises *The Illustrated Report*. It advises the reader, accurately, that *The Illustrated Report* contains the complete text of the official *Report*. It states, correctly, that the depictions contained in the brochure, taken from *The Illustrated Report*, could have been part of the studies made by the Commission. The brochure emphasizes that the President is to be criticized for dismissing *The Commission Report* "out of hand"; that suppression of the *Report* is demeaning to every adult; that adults should be allowed to make their own decisions and

that many of them probably will do so after reading *The Illustrated Report;* that the book is a "MUST" for the research shelves of every library seriously concerned with intellectual freedom and adult selection. In short, the brochure communicates information about the book it is advertising; expresses opinions about it; expresses political views concerning the subject of obscenity; and urges the public to read *The Illustrated Report.*

Dr. Wilson testified that the brochure "is an advertisement for a book that contains a great deal of information, of facts, relative to a very important issue in our society, and that it has importance in trying to communicate the existence of this book and asked them to buy it and to read it." [J.A. 170]. On cross-examination, he elaborated on this theme [J.A. 177-182], concluding that since the brochure advertised a book that has social value and since *The Illustrated Report* does present the kind of ideas the brochure claims that it does, the brochure is valuable.

Commissioner Larsen testified that the brochure fairly advertised *The Illustrated Report* and had social importance for essentially the same reasons that the book had social importance [J.A. 19]. After testifying to the importance of advertising, particularly in connection with the sale of books, he testified that the brochure in question tells the person what the book is about; it represents the material fairly; it makes an argument for purchasing the book; and tells how it may be obtained [J.A. 191]. The brochure, he testified, makes a strong claim about why the book should be purchased [J.A. 192]. It puts a complex social issue into a political framework and, in so doing, reflects accurately that the official *Report* was received negatively

by political leaders. The brochure politicalized the issue by stating that "even the President dismissed the facts [found by the Commission] out of hand", and that this is "an inexcuable insult directed at every adult in this country" [J.A. 192-193]. By focusing upon the political issue, Commissioner Larsen stated that the advertisement might attract the attention of people desirous of finding out what the President was objecting to [J.A. 193]. In addition to being a political issue, Commissioner Larsen believed that the *Report* also raised social, family, community and moral issues [J.A. 193].

Commissioner Larsen described the brochure as quite similar to brochures large publishing companies use in advertising textbooks [J.A. 199]. These brochures, like the brochure at issue, "often include a montage of photographs that are used in the text, and then a . . . message" which states in effect, "this is what you need and here is where you get it" [J.A. 199]. The brochures used by the major publishers are usually two pages, like the brochure at bar, and "is in color and [attempts] to attract the attention of the viewer" [J.A. 199]. In short, Commissioner Larsen testified that the format of the brochure in question is essentially the same as the format customarily used by major publishers in selling textbooks [J.A. 199-200]. Since *The Illustrated Report* deals with explicit sexual material, it is quite proper, he testified, for the brochure to use explicit sexual material to attract attention [J.A. 200]. In addition to the illustrations, the brochure emphasized "the monumental work of research and investigation" of the *Report*, and "the right of [an individual] to have access to [*The Illustrated Report*] and make up [his] own mind" [J.A. 200].

Commissioner Larsen testified that the emphasis on the right of free choice was the critical issue at stake [J.A. 200]. Some people, he thought, would be more upset about the statement concerning the President than they would about the pictures [J.A. 201]. Commissioner Larsen also testified that the pictorial portion of the brochure has social value because there is great curiosity about such representations and the public has demonstrated its interest in such material by purchasing similar material and apparently deriving value from such material [J.A. 208]. Such pictures evoke positive reactions from people; they enhance communication among married persons; they are informative, without causing damage.

Dr. Jack Haberstroh, an advertising expert and Assistant Professor of Advertising in the Journalism Department of San Diego State College, described the brochue advertising *The Illustrated Report* as a factual, straight-forward, serious and truthful advertisement [J.A. 187]. It was his opinion that the brochure had redeeming social value because it honestly promotes the sale of a book that has great social significance [J.A. 187]. By acknowledging that there was dissent concerning *The Commission Report*, the brochure was within a frame of reference of social value [R.T. 4002]. Dr. Haberstroh did not find the photographic illustrations in the brochure misleading or detracting from its social value [R.T. 4002-4003]. On the contrary, he said: "Taken as a whole, the photographs and the mail piece itself . . . is probably a more truthful kind of mailing piece of advertising than many others which have nothing to do with sexually explicit material" [R.T. 4003].

On cross-examination, Dr. Haberstroh stated that the brochure in question is more honest than many advertisements for products such as toothpaste, perfume, shaving cream etc., which falsely promise sexual success if only the product is bought and used [R.T. 3999-4003, 4035-4036]. He pointed out that the brochure in question, unlike many other advertisements, did not contain any "double entendre statements" or any sexually stimulating statements [R.T. 4036].

Commenting about the statement in the brochure, "Thanks a Lot, Mr. President", Dr. Haberstroh testified that it referred to the fact that President Nixon disavowed the work of the Commission and that the statement is a very serious comment and commentary about the Administration in Office [J.A. 187]. Dr. Haberstroh testified that the brochure had to be considered in terms of the particular book it was selling and that the book had a message that all persons ought to be listening to. "If we object to the present obscenity and pornography laws, or if we are in favor of the present obscenity and pornography laws . . . we should be listening to the message contained in this book", which the brochure advertises [J.A. 189-190].

Dwight W. Swain, a Professor of Journalism at the University of Oklahoma, and a man with a vast practical experience in the mass media [R.T. 3753-3783], also testified that the brochure had redeeming social value [J.A. 185].

The Government called a single witness in its attempt to establish that the brochure was without redeeming social value. Mr. Frank Getlein, a newspaper man without other credentials, testified that the brochure was without social value for the same reasons he

believed *The Illustrated Report* was without social value [J.A. 149-150]. As heretofore noted, he referred to the brochure as "a kind of miniature of the book itself" [R.T. 2372]. Referring to the textual portion of the brochure, he said: "[It] is simply a selling piece with kind of a pass at liberty of expression and learning etc., being made very faintly even in that [J.A. 151].

B. The Record Establishes That the Brochure Is Not Patently Offense to National Standards or to Standards of the Southern District of California.

Both Commissioner Larsen and Dr. Wilson testified at length that the brochure was not patently offensive and did not go substantially beyond customary limits of candor in the description of sexual matters. They each relied on scientific surveys and studies that indicate that similar material is generally available and acceptable throughout the Nation, and that people have voluntarily exposed themselves to such materials to satisfy a normal curiosity and do not find such material patently offensive.

Dr. Wilson testified that pictures as explicit as those at bar are available and acceptable throughout the Nation, and that people voluntarily buy and view substantial numbers of publications containing similar illustrative material [J.A. 166-167]. Dr. Wilson had great familiarity with the degree of acceptance of sexually explicit material throughout the Nation [R.T 3575] and in San Diego, within the Southern District of California [R.T. 3575-3581].

Commissioner Larsen testified that the tolerance level for sexually explicit material has greatly broadened over recent times and that if there has been a sex-

ual revolution it has been a revolution in the communications aspect of such materials [R.T. 4235]. The scientific studies and his personal experience convinced him that substantial numbers of persons were not offended by pictorial material such as that at bar [R.T. 4325]. The pictorial material, he testified, is not patently offensive because the range of reaction to such material is highly variable [R.T. 4235]. It is a social fact, he testified, that people are not automatically offended by such materials [R.T. 4236]. From responses of students and large audiences, he found that people were willing to look at such pictures [R.T. 4236].

A national survey, conducted on behalf of the Commission, revealed that a majority of the American people (almost 60%) believed that adults should be allowed to read or see any explicit materials they desired. The survey, and the additional studies, conducted by the Commission indicate that the American people have an enormous interest and tolerance for sexually explicit material; that they voluntarily expose themselves to such material and find benefit in doing so; that the marketplace contained and the American people accepted sexually explicit material similar to the pictures at bar. In light of the changing standards of acceptability of sexual material and the tolerance and interest shown by the American people for such material, Commissioner Larsen was of the opinion that the pictures at bar were not patently offensive and did not go substantially beyond customary limits of candor in the Nation as a whole [R.T. 4228-4229, 4247-4250, 4262-4265, 4314-4322].

Commissioner Larsen testified that the brochure did not patently offend national standards for the additional reason that "the tolerance level for what goes

on in advertising is probably greater than in any other sector of American life given the vast experience we have had with [advertising]" [J.A. 194].

The Government again relied on Mr. Frank Getlein as its sole witness on the question of customary limits of candor. His qualifications on this aspect of the case consisted of having visited a number of adult bookstores in various parts of the country and talking casually to various persons on the subject as he traveled throughout the country. In the twelve months prior to his testifying, he had visited only three adult bookstores and, while there, was unable to see the contents of most of the material because they were wrapped in cellophane and he never purchased any publications from those stores [R.T. 2297-2298, 2306, 2493]. He testified that in his opinion the brochure went substantially beyond customary limits of candor in depicting sexual matters [J.A. 194-195].

On cross-examination, Mr. Getlein conceded that a photograph of a female touching the genitalia of a man is not beyond customary limits of candor [J.A. 152]. He also testified that a photograph of mouth genital contact with the penis of a man was within contemporry standards [J.A. 153], although such a picture "would not appear in Life Magazine" [J.A. 154]. Similarly, a photograph of cunnilingus, he testified, is within community standards [J.A. 154]. Such photographs, and the acts themselves, he testified, are "obviously accepted by the community as within its standards" [J.A. 153].

C. The Record Establishes That the Brochure Does Not Appeal to the Prurient Interest of the Average Person.

Commissioner Larsen and Dr. Wilson testified that the brochure did not appeal to the prurient interest of the average person. Both witnesses relied heavily upon the empirical data from the extensive surveys and scientific studies engaged in by the Commission [J.A. 167-169, 193-194, 201; R.T. 3521, 3522; 4232, 4287-4291]. This scientific empirical data demonstrates that pictures similar to those in the brochure have a variety of appeals and a variety of responses, depending in part on the message and, in part, on "the eye of the beholder"—what he has experienced and his predispositions [R.T. 4232; 3521]. Persons will react differently to sexually explicit material, depending on such factors as age, education, size of community, attendance at a place of worship and sexual experiences [R.T. 3521; 4232-4233, 4287-4295]. Some people looking at sexually explicit material will call it "disgusting", while others looking at the identical material will call it educational, entertaining or informing [R.T. 4288]. Empirical data indicates that most people in America voluntarily expose themselves to pictures similar to those at bar without harm and without having their prurient interest aroused [R.T. 3521, 3536]. The consensus of informed professional opinion is that such pictures appeal to the natural curiosity of the average person and not to any prurient interest [R.T. 3522, 3546, 3684-3695].

Both Commissioner Larsen and Dr. Wilson also viewed the brochure as an appeal to reason rather than an appeal to prurient interest. They both testified that the extensive scientific research carried out by the Effects Panel of the Commission persuaded them that the pictures in the brochure do not evoke the lustful, shameful, morbid reactions which are the ingredients of prurient interest [R.T. 3521-3522, 3536-3538, 3546, 3672, 3683, 3685-3695; 4233; 4243-4246; 4247; 4288-4292; 4321-4323].

The Government relied solely on Dr. Melvin Anchell, a self-proclaimed psychiatrist [R.T. 1586] on the prurient interest issue. Dr. Anchell was a general practitioner of medicine in Texas, when he decided, on his own, to practice psychiatry. He is not a Board certified Psychiatrist, nor has he ever had published any articles in professional medical journals [R.T. 1606-1635, 1638]. Dr. Anchell's testimony concerning the brochure was limited to a single word. When asked for the dominant theme of the brochure, he answered "pruriency" [J.A. 147].

D. Documentary Evidence, Introduced by the Government, Establishes That the Brochure Is Not Obscene.

Documentary evidence introduced by the Government itself establishes that the brochure is not obscene. The Government introduced *The Report of the Commission on Obscenity and Pornography* as Exhibit 22. This evidence, introduced by the Government, contains relevant empirical data bearing on each of the three elements of obscenity, and supports the testimony of petitioners' experts that the brochure does not appeal to prurient interest, is not patently offensive, and is not utterly without redeeming social value [*Commission Report*, 352-357].

E. The Government Failed to Discharge Its Burden of Proving Under Our Criminal Standards That the Brochure Was "Utterly Without Redeeming Social Value", Patently Offensive to "National Standards" and Appealed to Prurient Interest, Applying "National Standards".

In *Miller v. California*, 413 U.S. at 21-22, the Court recognized that prior to June 21, 1973, the *Memoirs* three-pronged test was the law of the land. Until *Miller* was decided, "*Memoirs* required that to prove obscenity it must be affirmatively established that the material [was] 'utterly without redeeming social value'. . . . *Memoirs . . . called on the prosecution to prove a negative, i.e.,* that the material was 'utterly without redeeming social value'—a burden virtually impossible to discharge under our criminal standards of proof." In the case at bar, the Government plainly failed to meet this "virtually impossible to discharge" burden of proving beyond a reasonable doubt that the brochure is "utterly without redeeming social value".

The Government similarly failed to meet its heavy burden of proving that the brochure was patently offensive to national standards and appealed to the prurient interest of the average person in the Nation as a whole. As heretofore observed, this Court stated in *Miller* that when triers of fact are asked to decide whether the average person, applying contemporary community standards, "would consider certain materials 'prurient', it would be unrealistic to require that the answer be based on some abstract formulation. . . . To . . . structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility. . . . [A] 'national' standard of First Amendment protection enumerated by a plurality of this Court [in *Memoirs*] was correctly regarded at the

time of trial as limiting . . . prosecution under the controlling case law." (413 U.S. at 30-31) (Emphasis in original). The Government's skimpy proof totally failed to meet the high standards required in every criminal case (see, *In re Winship*, 397 U.S.358, 361-364), and particularly required in criminal cases touching on First Amendment rights. See, *Gojack v. United States*, 384 U.S.702; *Speiser v. Randall*, 357 U.S.513; *New York Times Co. v. Sullivan*, 376 U.S.254.

VI.

Petitioners Were Denied a Fair Trial, and Due Process of Law, When the Trial Court, in Open Defiance of Rule 30, Federal Rules of Criminal Procedure, Denied Petitioners the Opportunity to Make Objections to the Court's Jury Charge Outside the Presence of the Jury.

A. Rule 30 of the Rules of Criminal Procedure reads, in relevant part, as follows:

> ". . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury *and, on request of any party, out of the presence of the jury.*" (Emphasis added).

In 1966, Rule 30 was amended by adding the italicized words. Notwithstanding the clarity of the Rule, the trial court denied petitioners' request that they be given an opportunity to make their objections out of the presence of the jury. After the court instructed the

jury, the following colloquy occurred between one of petitioners' counsel and the court [J.A. 257]:

"MR. FLEISHMAN: . . .

"I think the matter is at this stage very sensitive with the Jury here. I would suggest it wouldn't take long, perhaps not more than four or five minutes, but I would urge the Court to ask the Jury to go into the jury room while we present [our objections].

"I gather that sometimes words drift over to the jury at this stage of the proceedings.

"THE COURT: You have made all the objections suitable that I can think of. I want to send this Jury out. If you want to make a statement, make a statement.

"MR. FLEISHMAN: I would ask the Court if it is convenient, that they be excused for a few moments.

"THE COURT: No."

Thereafter, counsel was compelled to make objections to the judge's charge in the presence of the jury, and possibly in the hearing of the jury.

The objections covered a wide area, including the court's erroneous reference to a "magazine" instead of an advertisement; the court's instruction concerning expert witnesses; the court's instruction on the number of witnesses called by each side; the court's improper use of the term "indecent character"; the court's instruction on "knowledge"; the court's failure to make any reference to knowledge concerning Counts 2 through 5 and 7 through 13,[10] the court's instruction that the

[10]See [J.A. 231].

belief on the part of the petitioners that the material is not obscene is absolutely irrelevant; the court's instruction that material appeals to prurient interest if it has a *tendency* to incite lustful thoughts,[11] the court's instruction on "prurience"; the court's instruction concerning homosexuals as a clearly defined sexually deviant group,[12] the court's instruction that the prurient appeal of the material could be measured by its impact upon undefined sexually deviant groups; the court's instruction that the jury could consider "pandering" with regard to each and all of the elements of obscenity; the court's failure to give petitioners' tendered instructions on the essential elements of the offense; the court's failure to give an instruction based upon *United States v. Baranov*, 418 F.2d 1051 (9th Cir. 1969). Petitioners argued that the court's charge denied petitioners due process of law and denied them rights to freedoms of speech and press secured by the First Amendment. Petitioners were also forced to object in the presence of the jury to the court giving the Indictment to the jury to take into the jury room [J.A. 258-265].

Following all of this, the only further instruction the court gave to the jury was as follows [J.A. 265].

> "If during my instructions I referred to the advertisement as a 'magazine', rather than an advertisement, please disregard that reference."

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[11]Petitioners requested the court to instruct the jury that it was required to find, *beyond a reasonable doubt*, that the material aroused lustful thoughts [J.A. 261].

[12]The court instructed the jury that an example of a clearly defined sexually deviant group would be homosexuals [J.A. 240]. Counsel for petitioners were not informed that the court intended to give this instruction [J.A. 262].

B. The court below recognized, of course, that the trial court violated the plain command of Rule 30, saying: "While hindsight is very good at telling us that compliance with the rule would have been the right thing to do, it does not answer the question in this case." (481 F.2d at 324). The court below treated the violation of Rule 30 as an "inconsequential" procedural error that did not prejudice petitioners, saying that the trial court "held an extensive and exhaustive conference by way of reviewing the requests and settling the instructions to be given", and that accordingly it "should have been clear" to petitioners "that the after instructing conference at the bench was to be a perfunctory record saving session" (481 F.2d at 324). Finally the court below said in this regard:

> "Whatever reaction the jury might have had from *seeing or hearing* any part of the bench conference was the result of counsel's own doings and unnecessary for the preservation of [petitioners'] record of objections. We conclude that there was no prejudice to any of the [petitioners] as a result of the procedural error on the part of the district court to literally comply with Rule 30." (481 F.2d at 325) (emphasis added).

C. Neither the record nor the cases cited by the court below support that court's conclusion.

The record demonstrates that the harmful reaction the jury might have had from seeing or hearing the bench conference was *not* the result of counsel's own doing, and the bench conference was necessary for the preservation of petitioners' record of objections. Initially, it should be observed that the conference settling instructions was not as "extensive and exhaustive" as

the court below seemed to think it was, nor were all the instructions there settled. The evening before counsel were to argue the trial court stated:

> ". . . The instructions that I propose to give relative to the substantive counts . . . are contained in that packet that you have. It is from that packet that I will choose one or more of the subjects to instruct upon . . . and it is from that packet that we will go over the instructions. Now I have not had an opportunity—although I have been working on the instructions you still caught me short—I have not had an opportunity to go into which one of those instructions I propose to give. . . . [W]e will get together . . . tomorrow morning early, before you . . . argue, and I will let you know which ones I propose to give and then we will take it from there." [R.T. 4442-4443].[13]

Many of the instructions remained unsettled. Thus, with regard to one instruction being discussed, the court said: "That's yet to be determined" [R.T. 4457]; with regard to another, the court stated: "I will consider it" [R.T. 4471]; with regard to yet another, the court stated: "I might have to redo this" [R.T. 4479]. When the Government submitted its proposed modification to the court's instruction on "prurience", the court advised the Government that it was free to submit an addendum if it felt it necessary [R.T. 4487]. When counsel for petitioners asked for an instruction limiting the "pandering" instruction the court indicated it would give, the court stated: "I will have an instruction . . . that will minimize that question. . . ." [R.T.

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[13]Petitioners filed the bulk of their proposed instructions on October 13, 1971, approximately seven weeks before the trial court conducted the pre-instruction jury conference [J.A. 5].

4492]. With regard to another Government request, the court said: "I will work it in there some place" [R.T. 4495]. When petitioners requested an instruction in accordance with the ruling in *United States v. Baranov*, 418 F.2d 1051 (9 Cir. 1969), Government counsel stated that he was not sure what the court meant to do, whereupon the court stated: "I will take a look at that. We will see. That may go out entirely." [R.T. 4502]. When petitioners' counsel submitted another instruction, the court stated: "All right, I will take a look at it." [R.T. 4504].

There was considerable confusion at the settlement conference, because many of the court's instructions were not numbered or otherwise easily identifiable [R.T. 4466, 4473, 4480, 4485, 4497].

As noted above, the trial court did not have its proposed jury instructions in perfect order at the time of the settlement conference. Following a colloguy on one instruction, the court said: "You write them and you think they are great, and when you read them they sound terrible. I guess that is called editing" [R.T. 4494].

Since the settlement conference was held on the morning when argument was to begin, the court pressed counsel for petitioners to accelerate his objections, saying: "I really feel that under the circumstances, having reviewed [the] instructions and reviewed the addendums to these instructions and additional instructions, that is completely unnecessary for the purposes of your record to go through this matter and I think we ought to get on with argument at this point." [R.T. 4515. See also, R.T. 4481].

The court below discussed three cases in reaching its conclusion that the trial court's violation of Rule 30

was not grounds for reversal. *Hall v. United States*, 378 F.2d 349 (10 Cir. 1967); *United States v. Fernandez*, 456 F.2d 638 (2 Cir. 1972); and *United States v. Schartner*, 426 F.2d 470 (3 Cir. 1970). Additionally, the court below stated, without citation, that the *Fernandez* rule "appears to abide also in the 5th Circuit." (481 F.2d at 324). In *Hall*, the appellant had been convicted of unlawful entry into and larcency from a federally insured bank. After the charge to the jury had been given, the following colloguy occurred (378 F.2d at 349-350):

> "The Court: I will ask of counsel for the plaintiff and defendant if there is any further record either side cares to make with reference to the trial of this case before the bailiff is sworn to take charge of the jury.
>
> Mr. Raley: Nothing for the Government, your Honor.
>
> Mr. Burton: I do have some things to—
>
> The Court: You may come to the desk here.
>
> Mr. Burton: May I make my record out of the presence of the jury, your Honor?
>
> The Court: You can make it right now.
>
> Mr. Burton: May the record show we are in the presence of the jury.
>
> The Court: But out of the hearing of the jury."

Thereafter, defense counsel briefly noted his formal objections to the charge and his reasons therefor, and handed to the court an instruction with a comment that he "thought it was to be given". The court then gave the additional instruction to the jury. The Government argued that the lack of literal compliance with Rule 30 was not prejudicial because at a pre-instruction conference "defense counsel was granted full op-

portunity to argue and record his objections to proposed instructions outside the hearing and presence of the jury", and in any event "the jury was not adversely impressed by the later bench conference for, 'from all outward appearances,' defense counsel won his point as evidenced by the giving of the 'further instruction' requested by the defense." (378 F.2d at 350). The Tenth Circuit found "no merit" in the Government's argument, saying (378 F.2d at 350):

> "The amendment to Rule 30 was intended to allow counsel full opportunity to argue and record objections to the court's instructions and, upon request, to do so outside the presence of the jury in order to avoid the psychological pressure of low-tone bench conferences leading to truncated presentations and understandings. Neither the merits of the objections nor the success of the advocates are pertinent to the proper application of the rule. . . ."

In *United States v. Fernandez*, 456 F.2d 638 (2 Cir. 1972), appellant was convicted of bank robbery. The Second Circuit reversed the conviction in part because Rule 30 was not followed. The court noted that counsel for appellant was required to make her objections in open court, "with the consequent danger that the jury might infer that counsel's points were without merit. Yet F.R.Cr.P. 30, as amended in 1966, provides, as F.R.Civ.P. 51 has always done, that, on request of any party, opportunity shall be given to object to instructions out of the presence of the jury. The rule is so plain, and its purpose so obvious, that we can perceive no justification for ignoring it. Here we need not go so far as to hold, as was done in Hall v. United States, 378 F.2d 349 (10 Cir. 1967), that

refusal to grant a request that objections to the charge be heard out of the presence of the jury calls for automatic reversal. However, enforcement of F.R.Cr.P. 30 demands a principle at least as severe as that which we have applied in civil cases. . . ." (456 F.2d at 644). In footnote 6 (*Id.*, at 644), the court said: "[W]e do not put aside the possibility that the correct test in criminal cases may be that reversal will follow 'unless it be demonstrable on an examination of the whole record that the denial of the right did not prejudice' a defendant's case. United States v. Schartner, 426 F.2d 470, 479-480 (3 Cir. 1970)."

In *United States v. Schartner*, appellant was convicted, *inter alia*, of knowingly jeopardizing the lives of two bank employees with a gun. The conviction was reversed in part because Rule 30 was violated. The Government contended that the trial court's refusal to obey Rule 30 was harmless. In rejecting this argument, the Third Circuit stated that the Government misconceived the function of Rule 30, and held that "there should be reversal for non-compliance with Rule 30 even where the defendant cannot affirmatively prove prejudice. Rule 30, as we have indicated, was designed to avoid subtle psychological pressures upon the jurors which would arise if they were to view and hear defense counsel in a posture of apparent antagonism toward the trial judge. . . . These pressures would be largely imperceptible, and it would be very difficult for a criminal defendant to prove their presence in a particular case. . . ." (426 F.2d at 479). In footnote 11 (*Id.*, at 479), the court said: "Every trial judge and trial lawyer is aware of jurors' sensitivity to the attitudes of counsel in their disagreements with the trial judge."

As noted above, the court below, without citing a case, asserted that the Fifth Circuit appears to be in accord with the rule announced in *United States v. Fernandez*, 456 F.2d 638 (2 Cir. 1972). It is evident that the court below had in mind the case of *Hodges v. United States*, 243 F.2d 281 (5 Cir. 1957), since it was cited by both the Government and petitioners. In *Hodges*, the Fifth Circuit reversed a conviction for noncompliance with Rule 30, even before the amendment of 1966. After citing the Rule, which then provided that "[o]pportunity shall be given to make the objection out of the hearing of the jury", the court held it was error to require counsel "to state his objections in the presence of the jury". The court recognized that at this stage of the proceedings the case was approaching its "decisive climax", and referred to the Rule as a wholesome one, "bottomed on good sense which ought not to be weakened by tacit approval of breaches under a too easy application of the rule on harmless error. . . . Promulgated presumably because the administration of criminal justice demonstrates that substantial and irretrievable harm can come if persons charged with crimes and their counsel are compelled in the presence of the jury to engage in what to untrained laymen may appear to be criticism and condemnation of the Court or the judge presiding over it, the avoidance of that harm can best be assured by genuine adherence to the spirit and practice of the rule. Where the breach is not technical, momentary or inadvertent, and the record indicates that the defendant has as best he might in the awkward embarrassment of the situation registered opposition to such proceeding, that there may be no affirmative, actual demonstration of harm does not relieve the reviewing court from most careful appraisal." (243 F.2d at 283).

In *United States v. Huffman*, 467 F.2d 189 (6 Cir. 1972), appellant was convicted of mailing letters which threatened the lives of the President and Vice President. The Sixth Circuit reversed in part because the trial court failed to comply with Rule 30. After the court delivered its instructions, the following proceedings occurred:

> "BY THE COURT:. . .
>
> "Now, any—any request for any further instructions? . . . [A]ny objections or exceptions?
>
> MR. WARNER [defense counsel]: May I approach the bench? I've got one or two points. Are we going to argue that now?
>
> BY THE COURT: We can go ahead and take them up while they're out.
>
> MR. WARNER: All right."

After the jury retired, defense counsel stated his objections. In reversing, the Sixth Circuit said the procedure used by the trial judge "frustrated the purpose of the rule to provide an opportunity for the court to make corrections before the jury begins deliberations. . . . Upon request, counsel must be permitted to make objections out of the presence of the jury. . . . With the jury absent, counsel may argue for suggested changes without risking alienation of the jury." (467 F.2d at 194-195). Judge Weick, dissented, arguing that defense counsel "did make known to the Court his acquiescence in and agreement with the action which the Court was taking by replying, 'All right.' He never made an objection thereto." (467 F.2d at 196).

D. The court below stated that it was "manifestly clear" to it that at the time the district court invited counsel to the bench it was the intention of the court,

and *should have been* on the part of all counsel as well, that the after-instruction conference at the bench was to be a merely perfunctory record saving session" (481 F. 2d at 324). The court below assumed, erroneously, that the pre-instruction conference rendered the last sentence of Rule 30 "inoperative". The court, it is respectfully submitted, has confused the purposes of the pre-instruction conference with the post-instruction requirement that defendants in a criminal case object specifically to those instructions given to the jury of which they disapprove.

In *Dunn v. St. Louis-San Francisco Ry. Co.*, 370 F.2d 681 (10 Cir. 1967), the parties had a pre-instruction conference pursuant to F.R.Civ.P.51. "An extensive on-the-record conference ensued in which the requests were discussed in minute detail. The court indicated certain areas in which it might reconsider, and stated that some requests would be given in substance. Each party noted its objections to a number of requests of the other that the court had accepted, and noted a blanket exception to all of its requests that the court shall fail to give." (370 F.2d at 683). Thereafter and following the charge, and before the jury retired, the trial court stated:

> "Now, gentlemen, may it be understood for the record that all objections and exceptions which heretofore were taken by respective counsel for the parties will be considered as if they were now made at this time and entered into the record, and have the same force and effect as if repeated on the grounds heretofore given." (*Id.* at 683).

The Tenth Circuit strongly condemned the trial court, stating the procedure followed was "turning upside

down the meaning and purpose of Rule 51" (*Id.* at 683). The court explained that the requirement that the trial court inform counsel of its proposed action upon requests prior to their arguments to the jury is so that counsel may argue intelligently. The post-instruction conference "is to provide an opportunity to take exceptions" (*Id.* at 683). In emphasizing the importance of objecting to instructions after they are given, the court said: "We scarcely need to repeat that the purpose is at least two-fold, to make it abundantly clear to the court not only what is the party's position, but in what way the charge is believed to depart therefrom, and to give the court full opportunity to make corrections." (*Id.* at 683). As the court stated, the duty imposed upon counsel of stating distinctly the matter to which he objects and the grounds of his objection cannot formally be performed until the charge has been heard in its entirety. "Usually until then it cannot be told 'distinctly' to what extent a request has not been given. . . . [A]n a priori exception 'to the extent that the request is not given in substance,' meets none of the rule's requirements." (370 F.2d at 684). In a warning that would throw a cold chill down the spine of trial counsel defending persons facing total prison terms in excess of 400 years and fines in excess of $700,000[14] the court said:

> "While we do not say that an objection may never be properly preserved to a charge in ad-

[14]In the case under consideration, 4 individuals and 3 corporations were charged in a 21-count indictment. Count 1 thereof carried a prison term of up to 10 years and a fine of up to $10,000, and the balance of the counts carried a prison term of up to 5 years and a fine of up to $5,000. Thus, each individual could be sent to prison for 110 years. Each individual and each corporation was subject to a fine of up to $110,000. This is no

vance, we warn parties that there is a heavy burden upon them in such event to show that it was done with sufficient specificity and distinctness, and we caution district courts to be slow in tolerating such procedure. In particular a party may expect to find that he has not preserved any matter where the request could be thought, on the charge as made, to have been given in substance. Even after the charge, it is normally insufficient simply to refer to the requests by number. . . . And, finally, *we warn counsel that even if the district court acquiesces in a procedure which is insufficient, a party may find that his rights have not been preserved.* . . ." (*Id.* at 684) (emphasis added).

The Ninth Circuit has also warned of the importance of stating objections to a jury charge *after* the court has instructed the jury. In *Kobey v. United States*, 208 F.2d 583 (9 Cir. 1953), the attorney for the defense stated, after the court had instructed the jury: "* * * and I assign as error the failure to give the instructions we have requested on the grounds stated." (*Id.* at 588). In stating that defense counsel had failed to meet his obligations under Rule 30, the court stated that the cryptic and sweeping phrase "on the grounds stated" may have referred to some "suggestions" made by counsel during a conference on instructions. "In our view",

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fanciful matter. In *Aday v. United States*, 388 U.S.447, this Court reversed a conviction based on a violation of the statute at issue in the case at bar—18 U.S.C. §1461. Petitioner Aday had been found guilty on 5 counts based on 5 different mailings of the same book. The trial court imposed a prison term of 5 years on each count, to be served consecutively and not concurrently, for a total of 25 years. The court also imposed fines totaling $89,000 therein. See, *United States v. West Coast News, Inc.*, 357 F.2d 855, 864 (6 Cir. 1966).

the court said, "such a procedure does not meet the requirement of Rule 30 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., to the effect that 'No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, *stating distinctly the matter to which he objects and the grounds of his objection.*' Reliance upon 'the grounds stated' if any grounds *were* stated—the day before is palpably inadequate." (*Id.* at 588) (emphasis in original).

Ziegler v. United States, 174 F.2d 439 (9 Cir. 1949), cert. denied 338 U.S.822, also cast a doubt on the procedure of using a pre-instruction conference as a substitute for proper objections after the court instructs the jury. In *Ziegler,* the trial court, before giving the instructions, informed counsel of its proposed action. At the pre-instruction conference, the court informed the parties that their exceptions were allowed, presumably referring to the instructions requested by appellant, which the court indicated it would not give. The Ninth Circuit stated that the trial court's allowance of the exception could not be regarded as an objection by appellant to any part of the charge, because, *inter alia,* "it was made before the charge was given. Until the charge was given, there could be no objection to any portion thereof or omission therefrom. . . . Appellant did not object to any portion of the charge or omission therefrom before the jury retired to consider its verdict. Hence we are not required to consider" the objections to the trial court's charge (174 F.2d at 448).

In light of the above, the court below was demonstrably in error when it concluded herein that:

> "Whatever reaction the jury might have had from seeing or hearing any part of the bench conference was the result of counsel's own doings and unnecessary for the preservation of appellants' record of objections. We conclude there was no prejudice to any of the defendants as a result of the procedural error on the part of the District Court to literally comply with Rule 30." (481 F.2d at 325).

VII.

Petitioners Were Denied a Fair Trial by an Impartial and Representative Jury, in Violation of the Guarantees of the Fifth and Sixth Amendments.

A. The Trial Court Abused Its Discretion and Denied Petitioners Due Process of Law When It Refused to Grant a Short Continuance Which Would Have Afforded Petitioners a Jury Panel Which Did Not Systematically and Absolutely Exclude All Persons Under 24 Years of Age.

The master jury wheel from which petitioners' jury was drawn necessarily excluded all persons under 24 years of age and virtually all persons under 25 years of age. The facts are undisputed. In 1968, the master jury wheel was filled with names of persons who were then registered voters. The venire from which petitioners' jury was selected in October 1971 was drawn from that wheel. As the court below recognized, "the youngest person drawn in 1968 would be in his 21st year of age and that the youngest person on the venire [from which petitioners' jury was drawn] would be in his 24th year. In fact, there were a few persons on the venire of that age." (481 F.2d at 313). Before trial,

petitioners moved to strike the venire on the ground that the jury plan systematically excluded all persons under 25 years of age [J.A. 65-67]. In connection with their motion to strike the venire, petitioners introduced evidence establishing that young persons were a cognizable group and that they were more tolerant than older persons in matters pertaining to the depiction of sexually explicit material [R.T. 85-86]. The trial court recognized that young persons were in fact excluded and that such young persons would be better jurors for petitioners, saying: "It may well be that the best possible of all worlds for the [petitioners] in this case would be to have jurors from age 18 to age 25. . . ." [R.T. 91]. The Clerk of the court was called as a witness and, after testifying to the fact that the master jury wheel was last filled in 1968 with the names of then registered voters, stated that within one month the master wheel would be refilled with the names of persons who then appeared on the voters registration list and that the master wheel would then contain the names of persons 21 years of age and over [R.T. 94-98]. The trial court denied petitioners' motion to strike the venire, but stated that the evidence presented indicated that "it is time to change the jury master wheel" [R.T. 93]. Thereupon, petitioners moved for a short continuance, of approximately one month, so that their jury would be drawn from a master wheel that included persons 21 years of age or over [R.T. 95-98]. This motion was denied [R.T. 98].

The court below assumed, without deciding, that the young do constitute a cognizable group or class (481 F.2d at 314). Nevertheless, that court, finding petitioners' argument that they had been branded as felons by a jury consisting of older persons "in rather poor taste"

(*id.*), concluded that petitioners "have failed to show, let alone establish, a purposeful systematical exclusion of the members of that class whose names, but for such systematic exclusion would otherwise be selected for the master jury wheel. . . ." (*Id.*) The court below relied on *Whitus v. Georgia*, 385 U.S.545; *United States v. Butera*, 420 F.2d 565 (1 Cir. 1970); *United States v. Parker*, 428 F.2d 488 (9 Cir. 1970); *Hernandez v. Texas*, 347 U.S.475; and *Torres v. United States*, 270 F.2d 252 (9 Cir. 1957), to justify the trial court's refusal to grant the requested continuance. With all respect, those cases fail to support the conclusion of the court below.

In *Whitus v. Georgia supra*, petitioner was convicted of murder in a state court. This Court reversed, holding that proof that the State employed the same procedures which concededly resulted in discrimination in petitioner's first trial constituted a *prima facie* case of purposeful discrimination in jury selection for his second trial. In *Hernandez v. Texas, supra*, the Court reversed a murder conviction holding that the evidence warranted a finding that persons of Mexican descent were a separate class, distinct from Whites, and that there had been a systematic exclusion of Mexicans from jury service. In *United States v. Butera, supra*, appellant was convicted of income tax evasion. On appeal, he contended that the grand jury which returned his indictment was improperly constituted because certain segments of the population were *inadequately* represented in the jury pool from which his grand jury was drawn. The First Circuit agreed that there was inadequate representation, but concluded that the Government's explanation for this was satisfactory. In the case at bar, we deal with a conviction

by a trial jury resulting in heavy prison terms and large fines, not with the mere return of an indictment. Moreover, in *Butera*, there was "inadequate representation", while in the case at bar there was a total absence of persons under 24 years of age. Finally, there simply was no satisfactory reason for the trial court's refusal to grant the short continuance requested, which continuance would have alleviated the biased jury wheel.

In *United States v. Parker, supra*, the attack on the jury venire was based solely on the fact that the wheel from which it was drawn was filled with names of registered voters. The Ninth Circuit concluded that the use of voter registration lists, as the sole source of the names of potential jurors, "is not constitutionally invalid, absent a showing of discrimination in compiling of such . . . lists" (428 F.2d at 489). While petitioners' complaint herein is not based on the fact that the jury wheel was filled exclusively by names drawn from the voter list, it should be noted that "it is desirable to seek feasible ways to supplement the voter list". *United States v. Dellinger*, 472 F.2d 340, 366 (7 Cir. 1972). Petitioners' complaint herein is that the trial court failed to grant a very short continuance which would at least have given petitioners the opportunity of having persons 21 years of age and over on their jury.

In *Torres v. United States, supra*, the Ninth Circuit held that the mere fact that the trial court refused to grant a further continuance after granting two continuances before trial started and two continuances thereafter, could not be said to have resulted in denying effective assistance of counsel. While it is true that a motion for a continuance is ordinarily addressed to the sound discretion of the trial court, the discretion is not

absolute. This Court has had occasion to observe that one way to attempt to assure that an accused is tried by a fair and impartial jury "is to grant a continuance of the trial". *Groppi v. Wisconsin*, 400 U.S.505, 510. The Court, quoting from *Irvin v. Dowd*, 366 U.S.717, 722, said: "In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial . . . jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. . . . In the ultimate analysis, only the jury can strip a man of his liberty or his life."

In *Sheppard v. Maxwell*, 384 U.S.333, 354, n.9, the Court said: "At the commencement of trial, defense counsel made motions for continuance and change of venue. . . . Without regard to whether the judge's actions in this respect reach dimensions that would justify issuance of the habeas writ, it should be noted that a short continuance would have alleviated any problem with regard to the judicial elections. The court in *Delaney v. United States*, 199 F.2d 107, 115 (C.A. 1st 1952), recognized such a duty under similar circumstances, holding that 'if assurance of a fair trial would necessitate that the trial of the case be postponed until after the election, then we think the law required no less than that.' "

It is the policy of the United States that all litigants in federal courts entitled to trial by jury shall have the right to petit juries selected at random from *a fair cross-section of the community*. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on petit juries. Title 28 United States Code §1861. This Court has uniformly held that our traditional concepts of justice require that a jury reflect a cross-section of the com-

munity. In *Thiel v. Southern Pac. Co.*, 328 U.S.217, 220, the Court said: "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. *Smith v. Texas*, 311 U.S.128, 130, . . . ; *Glasser v. United States*, 315 U.S.60, 85. . . ." See, *Williams v. Florida*, 399 U.S.78, 100; *Witherspoon v. Illinois*, 391 U.S.510, 520; *Ballard v. United States*, 329 U.S.187, 192-193. This Court has repeatedly used its supervisory power over the federal courts in articulating the requirement that a trial jury must reflect a cross-section of the community. See, *e.g.*, *Ballard v. United States*, 329 U.S.187; *Thiel v. Southern Pac. Co.*, 328 U.S.217, 220; *Glasser v. United States*, 315 U.S. 60, 62.

In *Miller*, 413 U.S.15, 30, the Court stated that our adversary system "with lay jurors as the usual ultimate factfinders in criminal prosecutions has historically permitted triers-of-fact to draw on the standards of their community. . . ." In *Paris*, 413 U.S.49, 56, n.6, the Court, in holding that the prosecution need not adduce evidence on the elements of obscenity, said: "No such assistance is needed by jurors in obscenity cases." The Court appears to have adopted the view first articulated by Judge Learned Hand in *United States v. Levine*, 83 F.2d 156, 157 (2 Cir. 1956), that an obscenity trial is really "a small bit of legislation ad hoc". In 1957 Judge Hand returned to the same theme. Speaking at the American Law Institute, Judge Hand said obscenity "cannot be defined", and he therefore objected to "an attempt to define the undefinable" (34 A.L.I. Proceedings, 191 [1957]). Judge Hand concluded that "we must not try to be definite. We

must leave it to the jury to say, is this obscene? Is it contrary to what you all think ought not to be? . . . The attempt to mix in with this an objective standard . . . seems to me to be absurd." (*Id.* at 192).

If we are to entrust to a jury the responsibility of separating constitutionally protected speech from criminal speech, it is essential, at a minimum, to have the most representative possible jurors sitting in the box. This is true not only because First Amendment rights are at stake but also because the crime of obscenity is so vague and emotionally charged. In *Miller*, Justice Douglas, dissenting, observed that what causes a person to be upset with a particular publication "may reflect only his neurosis not shared by others" (413 U.S. at 41). He also asserted that obscenity cases "generate tremendous emotional outbursts" (*Id.*). In *United States v. Vuitch*, 402 U.S.62, Justice Douglas stated that the subject of obscenity is an inflammatory one. "People instantly take sides and the public, from whom juries are drawn, makes up its mind one way or the other before the case is even argued." (402 U.S. at 80). In *Ginzburg v. United States*, 383 U.S. 463, 479, Justice Black, dissenting, asserted that the submission of an issue of the obscenity of material to a jury "amounts to practically nothing more than a request for the . . . juror to assert his own personal beliefs about whether the matter should be legally distributed". In *United States v. Roth*, 237 F.2d 796, 822 (2 Cir. 1956), Judge Frank observed that "[a] particular jury may voice the 'moral sentiments' of a generation ago, not of the present". In an obscenity case, he said, each jury constitutes "a tiny autonomous legislature". If then each jury in an obscenity case is to act as "a tiny autonomous legislature", then that "legis-

lature" must have fair representation because it not only decides what literature should be preserved and what literature should be consigned to the bonfire, but also decides whether a person distributing that literature is to be consigned to prison.

B. The Trial Court Abused Its Discretion and Denied Petitioners Due Process of Law When It Improperly Refused to Ask Prospective Jurors Questions on Voir Dire Designed to Expose Their Biases and Prejudices Concerning "Obscenity" and Sex.

The Government's own evidence establishes that a person's attitude towards sex and obscenity is determined more by his religious commitments than by any other single factor (*Report of the Commission on Obscenity and Pornography* 356). Nevertheless, the trial court refused to ask the jurors any questions concerning religion, although petitioners submitted such questions.[15] Additionally, the court refused to ask the jurors, although requested to do so by petitioners, whether they or any person close to them "made contributions to or associated in any way with the

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[15]Among the questions tendered by petitioners were the following:

"Do you believe that your present views concerning obscenity are influenced by your religious training or beliefs, educational background and experience, political affiliation, upbringing as a child and area or areas in which you lived?

"If the answer to the foregoing is in the affirmative, please explain.

"How frequently do you attend a place of worship?

"Do you consider yourself to be a deeply religious person?

"If the answer to the foregoing is in the affirmative, please tell us how you would classify yourself in this regard.

"Within the last 12-month period, have you heard any sermons at your place of worship dealing with the subject of obscenity or sexual conduct?

"If the answer to the foregoing is in the affirmative, please explain." [J.A. 78-81].

organization known as the Citizens for Decent Literature", or any similar organization; whether any juror had expressed himself in favor of or in opposition to legislation which makes it a crime to distribute allegedly obscene material to adults; whether any member of the jury had seen within the prior 18-month period a film, or read a book, which he believed to be erotically arousing or sexually provocative; whether any juror had a personal opinion as to whether any particular sexual theme should not be portrayed pictorially or in writing; whether a juror would refraim from viewing a film solely for the reason that it was condemned by the Catholic Newsletter; whether any juror believed that the mere fact that sexually explicit material may arouse sexual feelings in an adult is harmful; and whether any member of the jury knew anyone who had any experience with material which they considered to be desirable or undesirable [J.A. 78-81].

The court below recognized that the trial court had declined to ask "many questions", which the court characterized as "cumulative and argumentative" (481 F.2d at 314). The court had asked no question on the subjects referred to above and petitioners leave to this Court the question of whether the questions were "argumentative". Citing *United States v. Peterson,* 475 F.2d 806 (9 Cir. 1973), the court below said:

> ". . . The handling of those questions not asked was clearly within the range of the District Court's discretion in the matter and no clear abuse of the discretion nor prejudice to the [petitioners] has been shown. It is of interest to note that no claim of jury contamination through pretrial publicity, local prejudice, or general attitudes, is asserted

here. Accordingly, the [petitioners'] reliance upon Silverthorne v. United States, 400 F.2d 627 (9 Cir. 1968) and the race and religion cases is ill placed." (481 F.2d at 314).

The importance of affording an accused a probing voir dire examination in criminal cases has repeatedly been affirmed by this Court. In *Aldrich v. United States*, 283 U.S.308, a Black man's conviction of murder was reversed because his counsel was not permitted to make inquiry of the prospective jurors concerning their possible racial prejudices. Chief Justice Hughes stated that the right to examine jurors on the voir dire as to the existence of a disqualifying state of mind had been recognized in state courts with respect to Blacks and others "and in relation to religion and other prejudices of a serious character" (283 U.S. at 313). The Court rejected the argument advanced by the Government that it would be detrimental to the administration of the law to allow questions to jurors as to racial or religious prejudices. The reply of Chief Justice Hughes was:

> ". . . We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute." (283 U.S. at 315).

The opportunity afforded a defendant in a criminal trial to voir dire his jury is closely linked with the right of peremptory challenge, a right that has "very old cre-

dentials". *Swain v. Alabama*, 380 U.S.202, 212. In our country, peremptory challenges are freely used and relied upon "because juries here are drawn from a . . . cross-section of a heterogeneous society". Because of this, "*voir dire* in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories. . . ." (380 U.S. at 218-219). The use of the peremptory challenge "is a necessary part of trial by jury". It is "one of the most important of the rights secured to the accused." (380 U.S. at 219). The denial or impairment of the right is reversible error without a showing of prejudice. (*Id.*) The function of the challenge is not only to eliminate extremes of partiality, "but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." The availability of peremptories "allows counsel to ascertain the possibility of bias through probing questions on the *voir dire*. . . ." (*Id.* at 219). Only if an accused can ask probing questions on voir dire can the peremptory challenge perform its task of permitting the rejection of a juror for "real or imagined partiality" that cannot be demonstrated. A peremptory challenge is often exercised upon a juror's "habits and association". (*Id.* at 220). It is also often exercised "on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation, or affiliations" of the prospective jurors. "It is well known that these factors are widely explored during *voir dire*." (*Id.* at 221). The concept of a fair jury

trial has built into it the right of an accused to engage in such explorations. "[V]eniremen are not always judged solely as individuals. . . . Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried." (*Id.*) In short, the right of peremptory challenge, together with related right to voir dire the prospective jurors for hidden prejudices, serve a crucial function in our pluralistic society. In *Hamm v. South Carolina*, 409 U.S.524, the Court held that it was constitutional error to refuse to make appropriate inquiry of the jurors as to their racial bias after petitioner, a Black man, made timely request for such inquiry. See, *United States v. Dellinger*, 472 F.2d 340, 367-370 (7 Cir. 1972), *cert. denied* 410 (U.S. 970; *United States v. Blount*, 479 F.2d 650 (6 Cir. 1973); *United States v. Lewin*, 467 F.2d 1132, 1137-1138 (7 Cir. 1972).

Prejudice and bias in the area of obscenity, touching, as it does, matters of religion, upbringing and the like, are deep running streams frequently concealed by the bland faces of prospective jurors. In order to effectuate a fair trial by a fair jury, this Court has repeatedly held that an accused must be given a fair opportunity to question prospective jurors so that the accused would have some basis for a reasonably knowledgeable exercise of the peremptory challenge. Petitioners herein were denied that right and were thereby denied a trial by a fair, neutral and impartial jury, guaranteed by the Sixth Amendment.

VIII.

Petitioners' Fifth Amendment Rights to a Neutral and Unprejudiced Grand Jury Were Violated Because the Government Attorney Made Biased and Prejudiced Remarks to the Grand Jury Which Returned the Indictment.

The court below acknowledged by way of supposition that the Grand Jury may have been "biased or prejudiced" against petitioners "upon viewing the Brochure and Report" (481 F.2d at 313). The court found however that the record "is totaling lacking of any evidence or showing of any kind that any member of the Grand Jury was biased or prejudiced", except as they may have been so by their reaction to the said brochure. (*Id.*) The record does disclose, however, that the government attorney who appeared before the Grand Jury that returned the Indictment did all he could to inflame and prejudice the Grand Jury.

At the commencement of the trial, petitioners called to the stand Larry Butcher (hereinafter referred to as "Butcher"), attorney, department of justice, and the attorney who presented the case against petitioners to the Grand Jury [R.T. 13-14]. Butcher testified that he advised the Grand Jury that they were to be "guided solely by their instinctive feelings. . . ." [R.T. 19-20]; that they were to be guided by the standards of "moral judgment" which they had "assimilated through the totality of their experiences" [R.T. 20-21]; that they were "the sole judges of the contemporary community standards of this country"; and that the term "con-

temporary community standards" refers to the "average conscience of the time" [R.T. 33].

Although Butcher was not sworn as a witness [R.T. 29], he discussed with the Grand Jury the factual situation in *Ginzburg v. United States*, 383 U.S.463 (1966), placing particular emphasis on a publication involved in *Ginzburg* [R.T. 26-28]. He also discussed the extent of the sales of the book involved in the *Ginzburg* case, and the advertisement involved in that case [R.T. 28]; and "drew a parallel" between the *Ginzburg* case and the case at bar, emphasizing for the Grand Jury that petitioners herein mailed out 55,000 circulars [R.T. 28]. Butcher advised the Grand Jury "that we felt that the facts in this case were similar enough to those in the Ginzburg case to present [the matter to the Grand Jury] to see if they felt there was probable cause to believe that a Ginzburg-type situation was present in the case at bar]" [R.T. 28-29] (481 F.2d at 313).

Butcher's conduct tainted the Grand Jury proceedings with bias and prejudice rendering the Indictment infirm. See, *Costello v. United States*, 350 U.S.359, 364 (Burton, J., concurring); *United States v. Di Grazia*, 213 F.Supp.232 (E.D. Ill. 1963); *United States v. Whitted*, 325 F.Supp.520 (D.C. Neb. 1971). In *Di Grazia*, the government attorney asked the defendant prejudicial questions which could only be calculated to discredit and impugn her in the eyes of the Grand Jury. The court assumed there was other evidence which, in itself, would have warranted the indictment, but concluded that a dismissal was required because it would be "pure speculation as to whether that evidence or the prejudicial conduct of the prose-

cutor or both prompted the Grand Jury's action." (213 F.Supp. at 235). In words that have special meaning to the case at bar, the court said:

> "It is the duty of a prosecutor presenting a case to a grand jury not to inflame or otherwise improperly influence the jurors against any person. . . . These principles are so well grounded . . . as not to require elaboration. Their application here leaves me no alternative but to dismiss the indictment. . . ." (*Id.*)

In *United States v. Whitted, supra,* the court "concluded that it [was] impossible to determine whether the indictment . . . was returned on the basis of evidence or by the possible prejudice and bias of the jurors or both, and accordingly" dismissed the indictment (325 F.Supp. at 521).

Petitioners are mindful that on mandamus the Eighth Circuit held that Chief Judge Robinson was without jurisdiction to act at the time he dismissed the indictment. *United States v. Whitted,* 454 F.2d 642 (8 Cir. 1972). The basis for this ruling, however, was the finding by the appellate court that there were no "facts concerning the grand jury bias which were elicited at trial, but had been unknown to the trial judge at the time he [initially] overruled the motion to dismiss. . . ." (454 F.2d at 645).

In the case at bar, the prosecutor acted with gross impropriety before the Grand Jury, raising a high probability that the Indictment was returned as a result of bias or prejudice. Accordingly, the Indictment here should be dismissed.

Conclusion.

For the aforesaid reasons, and for the reasons set forth in the companion Brief filed on behalf of petitioners Kemp, Wright and Thomas, the judgments of conviction herein should be reversed.

Respectfully submitted,

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I.

The Standards for Judging Scienter in Obscenity Prosecutions Should Conform to the Free Speech and Press, Due Process, and Fair Trial Provisions of the First, Fifth and Sixth Amendments. Rigorous Standards Are Required to Assure the Public's Access to Constitutionally Protected Material, to Avoid Additional Ambiguity in the Definition of Obscenity, and to Guarantee That an Act With Innocent Intent Shall Not Be Deemed a Crime in Obscenity Prosecutions. Mere Proof of Knowledge of Contents Is Not Sufficient to Establish Guilty Knowledge. The Trier of the Facts Should Be Required to Find Beyond a Reasonable Doubt That the Accused Knew the Contents of the Material; Was Aware of the Obscene Character of the Contents; and With Such Knowledge and Awareness, Intentionally Disseminated the Material With the Specific Intent to Appeal to the Prurient Interest of the Recipient. An Honest Belief That the Known Contents of a Publication Are Not Obscene Should Constitute a Defense. The Rulings of

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-507

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS KEMP, WRIGHT AND THOMAS.

Opinion Below.

The opinion of the Court of Appeals is reported at 481 F.2d 307 and appears in Appendix A to the Petition for Writ of Certiorari, pages 1 through 38.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 7, 1973. A due and timely petition for rehearing and suggestion for rehearing *en banc* was filed on or about June 18, 1973. On August 22, 1973, an order was entered stating that the afore-

said petition "will be submitted to the full court".[1] A copy of the said order appears in Appendix B to the Petition for Writ of Certiorari, pages 39 and 40. On August 23, 1973, an order was entered denying the petition for rehearing and rejecting the suggestion for a rehearing *en banc*. A copy of the said order appears as Appendix C to the Petition for Writ of Certiorari, page 41. On August 28, 1973, the Honorable Stanley N. Barnes, a Judge of the United States Court of Appeals for the Ninth Circuit, made an order staying issuance of the mandate of the court pending the filing, consideration and disposition by this Court of a Petition for a Writ of Certiorari on or before September 24, 1973. A copy of the said order appears as Appendix D to the Petition for Writ of Certiorari, page 42. The Petition was filed on September 18, 1973, and Granted on January 14, 1974. Jurisdiction of this court rests on 28 U.S.C. 1254(1).

Questions Presented.

1. Whether provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, under a standard for judging scienter solely by alleged proof of knowledge of the "contents" of the brochure involved, the courts below having rejected any requirement of proof of knowledge of the alleged obscenity of the brochure or proof of reckless disregard of the alleged obscenity, or intent to commit a public wrong, and specifically rejecting a defense of honest ignorance of the alleged obscenity of the bro-

[1]An order was initially entered on July 9, 1973, denying the petition for rehearing, but was thereafter, by order of the court, withdrawn on July 19, 1973.

chure, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute an infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

2. Whether the provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, without any evidence to establish that each of the petitioners even possessed knowledge of the alleged contents of the brochure, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

3. Whether the provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, without proof of the essential elements of obscenity and scienter, or proof of corrupt agreement or aiding and abetting or causation by petitioners, under both the conspiracy and substantive counts of the indictment, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

4. Whether the provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the trial court excluded an entire category of constitutionally relevant evidence offered by petitioners on the issues of nonobscenity of the brochure and lack of guilty knowledge, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

5. Whether the provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the indictment was returned by a grand jury which was presented with no evidence of the essential elements of the offense charged, which was misdirected by the prosecutor as to the applicable law, and where the prosecutor appealed to the biases and prejudices of the members of the grand jury, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

6. Whether the provisions of Title 18 United States Code §1461, on their face and as construed and applied to petitioners' pre-June 21, 1973 conduct, violated the guarantees of the First and Fifth Amendments

to the United States Constitution, because they failed to provide "fair notice" or "concrete guidelines" as to what sexual expression was prohibited by the provisions of the statute.

7. Whether, in light of this Court's June 21, 1973 rulings, the Indictment herein is fatally defective because it failed to inform petitioners of the nature and cause of the accusations against them in violation of the provisions of the Sixth Amendment.

8. Whether the provisions of Title 18 United States Code §1461, on their face and as construed and applied to authorize the jury to measure the prurient appeal of the brochure by its impact on undefined sexually deviant groups rather than solely by its impact on the average person in the Nation as a whole, violated the free speech and press provisions of the First Amendment and the due process provisions of the Fifth Amendment.

9. Whether the provisions of Title 18 United States Code §1461, on their face and as construed and applied, violate the free speech and press provisions of the First Amendment and the due process provisions of the Fifth Amendment, because the trial court instructed the jury that it could find the brochure obscene even if the brochure did not meet the *Roth-Memoirs* test if the jury found "pandering", notwithstanding the fact that neither the statute nor the Indictment fairly advised petitioners that they were charged with pandering.

10. Whether the brochure at issue is protected by the free speech and press provisions of the First Amendment.

11. Whether petitioners were denied a fair trial, and due process of law, when the trial court, in open

defiance of Rule 30, Federal Rules of Criminal Procedure, denied petitioners the opportunity to make objections to the court's jury charge outside the presence of the jury.

12. Whether petitioners were denied a fair trial by an impartial and representative jury, in violation of the guarantees of the Fifth and Sixth Amendments.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fifth, Sixth and Eighth Amendments; Title 18 United States Code §§2, 371 and 1461; and Rule 30 of the Federal Rules of Criminal Procedure appear in Appendix E to the Petition for Writ of Certiorari, pages 43 through 46.

Statement.

In order to enable the Court to expeditiously determine the issues in the case, the parties in this proceeding have divided the discussion of the issues presented for review. The brief herein, on behalf of the petitioners Kemp, Wright and Thomas, is principally devoted to discussion and analysis of the *scienter* issue, the conspiracy issue, and the issue with respect to the exclusion of evidence by the trial court. These issues are covered primarily by the Questions Presented numbered 1, 2, 3, 4 and 5. All of the remaining issues and questions presented, together with the extended Statement of the Case, appear in the companion brief being filed herein on behalf of the remaining petitioners,[2] and the petitioners herein adopt by reference, as if fully set forth at length, the aforesaid Statement of

[2]On the issues of *scienter* and conspiracy, the latter being essentially a specific intent crime, the discussion herein includes all of the petitioners.

the Case, together with the argument and the points of fact and law presented in said companion brief.

The Statement of the Case which follows is pertinent to the issues and questions presented in the brief and argument herein.

The charge in the indictment was that the book, "The Illustrated Report", was mailed from the Southern District of California (San Diego), where the place of business was located. On the other hand, the indictment charged that the advertisement, the brochure, was mailed from the Central District of California (North Hollywood) and that petitioners either aided or abetted said mailing or conspired to mail the said brochure. In this respect, the evidence adduced by the prosecution was as follows.[3]

Richard Harte and his wife, Venita Harte, doing business as Academy Addressing and Mailing Service [JA 122][4] were engaged in the business of performing a service for persons who wished to have commercial mailings. Their service consisted of the insertion of letters, brochures, and the like, into envelopes [JA 122]. Some time in January, 1971, Mr. Harte received a telephone call from a man named Bernard Lieberman on behalf of Regent House, located in North Hollywood, California [JA 123]. Mr. Harte learned later that Mr. Lieberman was a warehouseman for Regent House.[5] The sole service rendered by the Hartes was

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[3]The reference "JA" is to the Joint Appendix. The reference "R.T." is to the Reporter's Transcript of Proceedings. The reference "C.T." is to the Clerk's Transcript.

[4]The Hartes were named as unindicted co-conspirators in the indictment [JA 14].

[5]Bernard Lieberman, doing business as Regent House, North Hollywood, California, was named in the indictment as an unindicted co-conspirator [JA 14].

the insertion of the brochures and a return envelope into an outside envelope and the sealing thereof [JA 124]. The Hartes affixed postage to the envelopes through the use of a meter head owned and furnished by Regent House [JA 124-125]. Mr. Harte knew nothing about the corporate petitioners Library Services, Inc., and Reed Enterprises, Inc., or the corporate defendant Greenleaf Classics, Inc., and he had never had any dealings with nor did he know the petitioners Earl Kemp, Shirley Wright, David Thomas or William Hamling [JA 126, 127-128].

It should also be noted at this point that no officer or employee of Regent House, nor the aforesaid Bernard Lieberman, ever appeared at the trial to offer any testimony.

There is no evidence in the record of any kind as to who was responsible for the preparation of the contents of the advertisement.

Mrs. Harte, who worked with her husband, was responsible for the billing, and she billed Regent House for the services furnished by Academy Addressing and Mailing in the sum of $541.15 [Gov. Ex. 25; JA 129]. The Hartes did not personally mail the envelopes. They presumably were picked up by Regent House [JA 130]. All that Academy did was to send a bill to Regent House and get a check back [JA 132]. No name of any individual petitioner appeared on the envelopes or on the advertisements.

The government offered into evidence [Gov. Ex. 29-A; R.T. 770] a photocopy of a check drawn on the Regent House account in the amount of $3,300.00 to the United States Postmaster. According to the government, Regent House billed Reed Enterprises, Inc., in

the form of what was described at the trial as an adding machine tape [Gov. Ex. 47; R.T. 829], for a total sum of $4,102.27, which allegedly covered the amount billed by Academy, postage costs, and a few other minor items. Thereafter, on January 19, 1971, a check from Reed Enterprises to Regent House in the sum of $4,102.27 was introduced into evidence bearing the signature of petitioner William Hamling [Gov. Ex. 48; R.T. 830]. The government also introduced an invoice from London Press, Inc.,[6] of North Hollywood, California, to Reed Enterprises, Inc., in the amount of $3,817.80 [Gov. Ex. 54; R.T. 827], which allegedly constituted a charge for the printing of the brochures, and a check in the sum of $4,843.14 [Gov. Ex. 56; R.T. 828], which allegedly included payment for the aforesaid bill and some other item, was thereafter made out to London Press, Inc., bearing the signature of petitioner Hamling.

No officer, employee, or other person on behalf of London Press, Inc., ever testified at the trial.

The trial court's instructions, and the failure to instruct as requested, on the issue of *scienter* are discussed hereafter in the Argument which follows.

The petitioners, on their own behalf on the fundamental issues of obscenity and *scienter*, offered documentary evidence as well as oral testimony by expert witnesses. The categories of documentary evidence which the petitioners proposed to introduce included, first, comparable publications which had received second-class mailing privileges; second, comparable publications which had been adjudicated by the courts to

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[6]London Press, Inc., was also named in the indictment as an unindicted co-conspirator [JA 14].

be constitutionally protected; third, comparable material openly available on the newsstands with confirming testimony that such material had received a reasonable degree of acceptance, both in the local community (San Diego) and in the nation as a whole; and fourth, material used by the commission. The trial court held that the law permitted proof by an accused of community standards "either by comparables, by the introduction of comparables or by the introduction of expert witnesses". The court ruled that "comparables will not be permitted for this reason: primarily they tend to confuse the jury. They tend to set up matters that I feel would serve no probative value in comparison to the amount of confusion and deluge of material that could result therefrom". The trial court therefore concluded that petitioners could produce expert witnesses, "but you are not permitted to use comparables in any manner before this jury" [JA 157-158].

Summary of Argument.

The government throughout the trial insisted that the sole standard for judging *scienter* under the statute and the indictment was proof of "knowledge of the contents" of the material. Both during the trial and in the instructions to the jury the court ruled out any requirement of proof beyond the nature and character of the contents of the material. The trial court specifically held that proof of the alleged obscene nature or character of the contents of the material was not a requisite standard, and that an honest belief on the part of an accused that the material was not obscene was not a valid defense. The trial court specifically instructed the jury that knowledge of the contents was the intent required, and that belief as to the obscenity or nonob-

scenity of the material was irrelevant. The Court of Appeals, relying upon the 1896 opinion of the Court in *Rosen v. United States*, affirmed that the sole standard for judging *scienter* was "knowledge of the contents".

Nothing in the statutory history of the federal obscenity statute indicates any purpose on the part of Congress to do away with the requirement of a guilty intent in order to ease the prosecution's path to conviction. The Comstock Act has always had a *scienter* provision. What the legislative history does make plain is that Congressional concern has always been that the line be properly drawn between the use of the mails for the dissemination of constitutionally protected materials and the use of the mails for the delivery of allegedly obscene materials. Legislative history, as well as decisions of this Court, indicate that the standards for judging *scienter* in obscenity prosecutions cannot be based solely on the notion that where obscenity is involved, all First Amendment inquiry is ended.

Determination of what sort of mental element is requisite to a constitutionally permissible prosecution under 18 U.S.C. §1461 is therefore of crucial significance in reaching the proper balance between the individual and societal interest in freedom of expression, and expression deemed so offensive as to be deprived of the guarantees of the Constitution. Prior decisions of this Court indicate that a majority of the Court has always felt that the standard for judging *scienter* in obscenity prosecutions includes, at the very least, proof of both knowledge of the contents of the material and awareness of the obscene character of the material. The stress has constantly been on *calculated* purveyance of

obscenity, and not the mere knowing dissemination of material dealing with sex.

It is important to distinguish between the problem of formulating a legal standard for judging *scienter* and the quality or quantity of proof required to meet such legal standard. The initial question is the applicable law, to wit, the instructions which a trial court is required to give to a jury in an obscenity prosecution. In formulating the appropriate standard, it should be initially noted that the only offense proscribed, and the only offense charged in the indictment, was the mailing of an obscene advertisement, that is, a brochure which allegedly was patently offensive because it affronted community standards relating to the description or representation of sexual matters; the dominant theme, taken as a whole, appealed to a prurient interest in sex; and was utterly without redeeming social value. The statute does not apply to all materials dealing with sex. It applies only to materials whose contents are obscene. By reason of the limiting construction given by the courts below to the standard for judging *scienter*, the petitioners herein, while charged in the indictment with knowingly mailing obscene material, were convicted solely of knowingly mailing material dealing with sex.

The standard for determining *scienter* must always be, it is submitted, knowledge of the essential facts which bring the obscenity law into play, and for this reason it is essential that the proof, in order to establish culpability, at the very least establish that the accused knew the contents of the material he was disseminating and was in some manner aware of its alleged obscene nature and character. If such guilty

knowledge be established, and the material is disseminated with specific intent to appeal to the prurient interest of the recipients, then the *mens rea* or *scienter* may be deemed established. There is virtually no area of the criminal law in which the general *mens rea* requirements for the establishment of liability do not include proof that an accused acted purposely and knowingly with respect to each material element of the offense. Moreover, unlike the ordinary criminal prosecution, obscenity prosecutions implicate First Amendment questions. Since the criteria for judging obscenity themselves contain a considerable degree of residual ambiguity, it is essential to avoid mistakes in fact finding by requiring clear and unequivocal evidence of guilty knowledge, as well as an intent based upon such knowledge to do the acts which constitute the harm against which the law is directed.

In *New York Times Co. v. Sullivan*, this Court concluded that the constitutional guarantees of the First Amendment prohibit a public official from recovering damages for a defamatory falsehood unless he proves with convincing clarity that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not. It is anomalous that false and libelous utterances with respect to public officials or public issues should receive the high protection, as aforestated, while the liberty to discuss and inform and educate the public with respect to such matters of human interest as sex and sexual relations is undermined by the virtual elimination of any *scienter* requirement in obscenity prosecutions. It is submitted that the standards for judging *scienter* should include proof of guilty knowledge and calculated purveyance, to wit, proof of knowledge of the obscene nature and

character of the contents of the material and specific intent to appeal to the prurient interest, and that an accused's honest belief that the known contents of material are not obscene should constitute a defense in an obscenity prosecution.

Proof of knowledge of the contents of a publication dealing with sex cannot rationally be deemed the equivalent of knowledge of the alleged obscenity of the publication. It is unreasonable and arbitrary to draw an inference of knowledge of obscenity from mere proof of knowledge of contents. Empirical studies indicate that such inference is fallacious. Persons have been repeatedly arrested, tried and convicted under obscenity statutes, only to have the convictions overturned because in the opinion of the appellate courts the material involved was not obscene. Persons with extensive legal training and experience find it difficult to cope with the uncertainties which permeate the subject of obscenity. Judges, juries, prosecutors, defense attorneys and police are often uncertain or in error as to the alleged obscenity of the contents of a particular publication.

With due deference, it is time to recognize that the epigram contained in the *Rosen* opinion rendered in 1896 has lost its viability. The *Rosen* decision was based on the *Hicklin* standards, rejected by this Court as unconstitutionally restrictive of the freedoms of speech and press. The issue today cannot be notice of what is meant "by decency, purity and chastity in social life". The issue today is what expression dealing with

sex is entitled to the protective guarantees of free speech and press, and what is not. It cannot be reasonably argued that everyone must know today what is or what is not "obscene expression", when the courts as well as the community are in disagreement as to where and how the line should be drawn. The standards for judging obscenity rely upon subjective moral, aesthetic, sociological and psychological determinations by those charged with application of the law. To presume that one who merely knows the contents of a particular publication conclusively knows that the contents exceed such standards is to unfairly convict innocent persons. The existence of such a conclusive presumption can only induce self-censorship and make material protected by the Constitution unavailable to the public.

The argument of prosecutorial convenience is also without merit. Juries are regularly required to find a *mens rea* element in prosecutions under federal criminal statutes, and there is no reason to believe that prosecutors would have any special difficulty under a construction of the federal obscenity statute requiring proof of guilty knowledge and intent as heretofore discussed. A study of the results in federal and state obscenity prosecutions has demonstrated that prosecutors have no difficulty in proving the requisite *scienter*, even where such requisite included proof of the obscene nature of the materials involved.

There has never been any claim by the government that it proved the individual petitioners, or the corporate petitioners, knew that the brochure or advertise-

ment was obscene as alleged in the indictment. There has never been a claim that petitioners intentionally mailed the brochure with such knowledge, or that the mailing of the brochures was accompanied by any intent of the petitioners to appeal to a prurient interest. Moreover, the record in this case is barren of any relevant evidence to show that any of these petitioners even knew the contents of the brochure at the times when the brochure was mailed, as alleged in the indictment. An analysis of the record with respect to each of the petitioners makes clear that the essential elements of the offenses charged against these petitioners was never proven. There was no proof of knowledge of the contents. There was no proof that petitioners had anything to do with the preparation or mailing of this particular brochure, and there is simply no evidence that petitioners willfully and knowingly conspired to violate the federal obscenity statute. There is no proof of a corrupt agreement on the part of these petitioners or a specific intent to violate the federal obscenity statute.

The trial court excluded an entire category of evidence offered by petitioners which bore importantly on the issues of obscenity and scienter. The court stated that under no circumstances would it permit the jury to consider, nor would the court itself consider, any comparison of the contents of the material involved in the prosecution with that of other comparable material openly published, widely distributed and generally accepted by the community. Thus, the jury was permitted

to conclude that the material involved exceeded the limits of candor set by contemporary community standards without ever being permitted to receive evidence as to the kinds of explicit sexual material the community generally tolerates. There was no possible justification for wholly denying petitioners all opportunity to present an entire category of testimony in their defense, even to the extent of excluding comparable material held entitled to constitutional protection by this Court. The petitioners here were deprived of essential exculpatory testimony for no legitimate reason, it is submitted. The right to present evidence is essential to the fair hearing required by the Due Process Clause, and this right is fundamental when the proceeding results in finding that a particular individual is guilty of a crime.

ARGUMENT.

I.

The Standards for Judging Scienter in Obscenity Prosecutions Should Conform to the Free Speech and Press, Due Process, and Fair Trial Provisions of the First, Fifth and Sixth Amendments. Rigorous Standards Are Required to Assure the Public's Access to Constitutionally Protected Material, to Avoid Additional Ambiguity in the Definition of Obscenity, and to Guarantee That an Act With Innocent Intent Shall Not Be Deemed a Crime in Obscenity Prosecutions. Mere Proof of Knowledge of Contents Is Not Sufficient to Establish Guilty Knowledge. The Trier of the Facts Should Be Required to Find Beyond a Reasonable Doubt That the Accused Knew the Contents of the Material; Was Aware of the Obscene Character of the Contents; and With Such Knowledge and Awareness, Intentionally Disseminated the Material With the Specific Intent to Appeal to the Prurient Interest of the Recipient. An Honest Belief That the Known Contents of a Publication Are Not Obscene Should Constitute a Defense. The Rulings of the Courts Below, and the Instructions and Failures to Instruct as Requested, Deprived Petitioners of Rights Guaranteed by the Provisions of the First, Fifth, Sixth and Eighth Amendments.

A. In pretrial proceedings, on motions to dismiss the indictment and for a bill of particulars, the government repeatedly asserted that the allegation of knowledge in the indictment called for nothing more than "knowledge of the contents" of the material: "It is not claimed that each of the defendants knew that the materials charged in Counts 2 through 14 and 19 through 21 of the indictment were, in fact, obscene.

The allegation of knowledge in those counts calls for nothing more than knowledge on the part of each defendant as to the nature of the contents of each mailing. See *Rosen v. United States*, 161 U.S.29 (1896)." [JA47; R.T. Vol. D, 7-9].

The trial court stated during pretrial proceedings: "The government alleges in the indictment knowingly. We don't know whether the government means knowingly . . . put the book in the mail, knowingly put the book in the mail knowing its contents, or knowingly put the book in the mail knowing its contents to be obscene." [R.T. Vol. C, 77-78]. The trial court resolved the issue by stating that "I think that the matter of knowledge that the government has to prove is a matter of instructions at the time of trial" [R.T. Vol. C, 80].

The petitioners requested the trial court to instruct the jury that the mere fact that a petitioner knew the contents of the material did not, for that reason alone, justify an inference that the petitioner knew the material was obscene [JA 72]. There was a request to instruct the jury that the government must prove beyond a reasonable doubt that each of the petitioners knew that the material exceeded contemporary standards, appealed to prurient interest, and was utterly without redeeming social importance [JA 72]. Another instruction proposed by petitioners stated that if the jury believed that any petitioner was honestly ignorant of the alleged obscenity of the material, then such petitioner should be found not guilty [JA 72]. There was a further request to instruct the jury that even if the jury found that petitioners, or any of them, knew that the material dealt with sex and portrayed sexual activities, that fact, in and of itself, was insufficient

to support a finding that the petitioners, or any of them, were aware of the obscene character of the material [JA 73]. The trial court was also requested to instruct the jury that the statute required proof, in addition to guilty knowledge, of a specific intent to appeal to the prurient interest [JA 73]. All of the aforesaid petitioners' proposed instructions were rejected by the trial court.

During the hearing on the proposed instructions, the trial court made the following statement:

> "I give and will be giving 'Specific Intent' only as it relates to the application of the conspiracy, which is in the conspiracy instructions, and only as it relates to the specific intent to do the act, to-wit, placing the matter in the mail with knowledge of the contents of the material." [R.T. 4454].

The trial court insisted that the instruction with respect to *scienter* would be knowledge of the nature or character of the contents. Counsel for petitioners objected.

> "I know that your Honor has previously taken a position with regard to what the knowledge is. I think that the way it ought to read as a minimum would be that the defendants had knowledge of the nature and obscene character of the contents. Otherwise, your Honor, it is just putting in some jokers there that would not be meaningful at all. Whatever it means, I would like your Honor to tell us.
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> "THE COURT: It means exactly what it says: The knowledge of the nature or character of the contents of the envelopes or packages." [R.T. 4470].

The trial court also indicated that it would give an instruction "that defendants' belief as to the obscenity of the material is immaterial, is irrelevant . . . That is, in my opinion, a correct statement of the law" [R.T. 4479].

The petitioners objected to all of the aforesaid failure to give petitioners' proposed instructions and to the instructions which the trial court proposed to give, as aforestated, on the issue of *scienter* [R.T. 4516-4517].

With respect to the offenses charged in the indictment, the trial court instructed the jury that the essential elements of the offense required to be proved beyond a reasonable doubt were willful depositing or causing to be deposited in the mails; "knowledge of the nature and character of the contents" of the material; and that the materials were obscene under the standards enunciated by the court [JA 229-230]. The trial court reiterated: "The requirement of knowledge in this case applies . . . to placing the subject material in the mails . . . and to the defendants' knowledge as to the contents of the envelopes and packages, and that is the intent required." [JA 235]. It must be proven beyond a reasonable doubt, stated the trial court, that petitioners had "knowledge of the character of the materials"; that the petitioners "were aware of the character and the nature of the materials"; but that petitioners' "belief as to the obscenity or non-obscenity of the material is irrelevant" [JA 235-236].

> "An act is willfully done, as I have stated before, if it is done voluntarily and intentionally and with the specific intent to do something the law forbids or, in this case, with the specific intent or knowledge of the contents of the package. . . . It is

ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted." [JA 237].[7]

Following the giving of instructions, petitioners once again requested the trial court to instruct the jury as to precisely what was meant by "knowledge of the character of the material". Petitioners urged that the jury be instructed that there must be at least proof of knowledge of the "obscene character" of the material. [JA 259]. Petitioners specifically objected to the court's instruction that belief on the part of petitioners that the material was not obscene was irrelevant and urged that proof of knowledge of obscenity or good faith belief in the non-obscenity of the material was relevant [JA 261].

The Court of Appeals adopted as the standard for judging *scienter* in federal obscenity prosecutions the rule enunciated by a district judge in *United States v. Rubin*, 312 F.Supp.950 (D.C. Cal. 1970). The court held that all that the government is required to prove is that "the defendant knew the contents" of the material. No other obligation is placed upon the government, stated the Court of Appeals, relying upon the decision of the Court in *Rosen v. United States*, 161 U.S.29 (1896). It again appeared to the Court of Appeals, in the year 1973, that: ". . . Every one who uses

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[7]During the course of his instructions, the trial court stated to the jury as follows: ". . . [I]f you believe the advertisements themselves to be obscene, the book not to be obscene, then the defendants would be guilty of counts 2-5 and 7-13 . . ." [JA 231-232]. Petitioners objected that the language of the instruction left the jury free to convict if they found the brochure obscene, without any reference to "knowledge" [JA 260]. See, *United States v. Hayward*, 420 F.2d 142, 143-144 (D.C. Cir. 1969).

the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd, and lascivious." (Appendix A, Petition for Writ of Ceriorari, pp. 21-24).

B. While the statutory history of 18 U.S.C. §1461 is meager on the issue of criminal intent, nothing in that history indicates any purpose on the part of Congress to do away with the requirement of a guilty intent in order to ease the prosecution's path to conviction. Congress did not intend to eliminate proof of *scienter* in obscenity prosecutions, which was required at common law, nor did Congress intend to deprive juries of their freedom to decide that if an unlawful act had occurred, the accused had not intended to cause it. From the outset, the Comstock Act has always had a *scienter* provision. See, Paul and Schwartz, *Federal Censorship*, "Obscenity in the Mail" 257 (1961).

What the legislative history of 18 U.S.C. §1461 does reveal with clarity is that Congress has been concerned with the line to be drawn between the use of the mails for the delivery of allegedly obscene materials and the use of the mails for the dissemination of constitutionally protected materials. Justice Holmes appropriately sensed the legislative intent when the Justice stated: "The United States may give up the postoffice when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues and it would take very strong language to convince me that Congress ever intended to give such a practically depotic power to any one man [Postmaster General]." *United States v. Burleson*,

255 U.S.407, 437. When the Act of 1876 was being debated in Congress, James Garfield made the following observations:

> ". . . We ought to be exceedingly careful in all our legislation touching this subject . . . Where freedom of opinion and of the press lie on the border of obscenity is a difficult question, and I would be glad if the committee . . . would consent to reference of this bill to the Committee on the Judiciary . . . in order that they may go over the whole subject and inquire whether we have not used terms too broad and too general in the original bill . . ." Paul and Schwartz, *supra*, 258.[8]

The real issue which has confronted Congress and the courts in this area is the need for the development of proper standards in the light of the breadth and scope of the free speech and press provisions of the First Amendment, together with the public's right to be informed on all matters of human interest, as contrasted with the more limited right of the federal government in the obscenity area. See, opinion of Justice Harlan in *Roth v. United States*, 354 U.S. at 504; *Lamont v. Postmaster General*, 381 U.S.301; *Blount v. Rizzi*, 400 U.S.410.

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[8]Another provision of the Comstock Act also made nonmailable every article or thing "designed, adapted or intended" for illegal contraception or abortion. The Reviser's Notes to 18 U.S.C. §1461 call attention to the rulings of the courts holding that the said provisions of the law should not be construed literally, and that the more reasonable interpretation is to construe the whole phrase as requiring an intent on the part of the sender that the article mailed or shipped be used for illegal purposes. In *Davis v. United States*, 62 F.2d 473 (6 Cir. 1933), judgments of conviction were reversed, the court holding that proof of the intent of a person mailing a circular conveying information for preventing conception should include proof that the circular was intended for an illegal purpose.

The Court has consistently recognized the importance of establishing standards which will distinguish between speech entitled to constitutional protection and expression which allegedly falls outside the ambit of the First Amendment. In *Roth*, the Court stated: "It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." 354 U.S. at 488. In *Smith v. California*, 361 U.S.147, 155, it was held: "The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power . . . It is plain to us that the ordinance in question, though aimed at obscene matter, has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution." In *Manual Enterprises, Inc. v. Day*, 370 U.S.478, 492, Justice Harlan stated: "Congress has required *scienter* in respect of one indicted for mailing material proscribed by the statute. In the constitutional climate in which this statute finds itself, we should hesitate to attribute to Congress a purpose to render a publisher civilly responsible for the innocuous advertisements of the materials of others, in the absence of any showing that he knew that the character of such materials was offensive." Even as late as June 21, 1973, a sharply divided Court was still striving to arrive at standards capable of distinguishing obscene material unprotected by the First Amendment, from protected free speech. *United States v. Orito*, 413 U.S. 139.

It therefore appears that the standards for judging *scienter* in obscenity prosecutions cannot be based solely on the notion that where obscenity is involved, all

first amendment inquiry is ended, and that proof of culpability in a case involving alleged obscene expression is no different from a case involving gambling paraphernalia or other contraband. The Court has emphasized: "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *New York Times Co. v. Sullivan,* 376 U.S.254, 269.

What sort of mental element is requisite to a constitutionally permissible prosecution under 18 U.S.C. §1461 is of crucial significance in reaching the proper balance between the individual and societal interests in freedom of expression, and expression deemed so offensive as to be deprived of the guarantees of the Constitution. "When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society." *Speiser v. Randall,* 357 U.S.513, 521.

C. It will be helpful, it is submitted, at this point to review briefly the rulings of the Court heretofore made with respect to the requirement of *scienter* in obscenity prosecutions.

When the Court initially promulgated the standards for judging obscenity in *Roth-Alberts,* the Court rejected the claim that the standards were too vague to satisfy the constitutional requirements of due process. The Court pointed to a series of decisions which upheld

criminal statutes as against claims that such statutes failed to provide adequate notice of what was prohibited. 354 U.S. at 492.[9] It is significant that in all of the cases cited, the statutes involved, while indefinite, concerned conduct which was objectively measurable; yet in each case the Court emphasized the requirements of proof of knowledge and specific intent, in order to save the statutes from constitutional infirmity. See, *United States v. Petrillo*, 332 U.S.1, 7-8 (specific intent to coerce with knowledge that additional employees were not needed); *United States v. Harris*, 347 U.S.612, 624, fn.15 (lobbying statute applies only to persons who intentionally solicited money for the purpose of defeating legislation); *Boyce Motor Lines, Inc. v. United States*, 342 U.S.337, 340 (government must show that petitioner knew that there was a practicable, safer route and yet deliberately took the more dangerous route); *United States v. Ragen*, 314 U.S.513, 523-524 (statute punishes only those who willfully attempt to defeat the law and who act in bad faith and who make intentional deduction of dividends in the guise of compensation for personal services); *United States v. Wurzbach*, 280 U.S.396 (statute punished intentionally solicited contributions); *Hygrade Provisions Co. v. Sherman*, 266 U.S.497, 502-503 (statute requires a specific intent to defraud); *Fox v. State of Washington*, 236 U.S.273 (statute construed as confined solely to acts which encourage an actual breach of the law); *Nash v. United States*, 229 U.S.373, 376 (statute applies only to contracts and combinations which, by reason of intent or the inherent contemplation of the accused, result in the restriction of competition).

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[9]The same cases were repeated in *Miller v. California*, 413 U.S.15, n. 10.

The assumption that proof of guilty knowledge and specific intent to commit a public wrong tends to mitigate the inherent ambiguity of obscenity statutes is implicit in the *Roth* decision. As Chief Justice Warren stated in *Roth-Alberts:* "The personal element in these cases is seen most strongly in the requirement of *scienter* . . . The federal statute limits the crime to acts done 'knowingly'. In his charge to the jury, the district judge stated that the matter must be 'calculated' to corrupt or debauch." 354 U.S. at 495.

In *Smith v. California,* 361 U.S.147, the Court was presented with an attempt by the municipality to impose a strict or absolute criminal responsibility in obscenity prosecutions. The local ordinance permitted convictions even without minimal proof that the accused knew the contents of the material involved. The Court held that the elimination of the *scienter* requirement would "tend to work a substantial restriction on the freedom of speech and of the press . . . but our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold . . . The bookseller's self-censorship, compelled by the State to be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded". 361 U.S. at 150-154.

Concurring in *Smith v. California,* Justice Black stated: "The Court invalidates the ordinance solely because it penalizes a bookseller for mere possession of

an 'obscene book', *even though he is unaware of its obscenity*." 361 U.S. at 156. (Emphasis added). Justice Frankfurter, in his concurring opinion, stated that as he understood the Court's opinion, it was holding "that one cannot be made amenable to such criminal outlawry unless he is chargeable *with knowledge of the obscenity*". 361 U.S. at 161. (Emphasis added). In the view of Justice Frankfurter, what was being left open for future decision was the quantity and quality of proof necessary to establish such guilty knowledge. 361 U.S. at 161-163. Justice Harlan, concurring in part and dissenting in part, expressed the view, which he had often expressed, that "the *scienter* question involves considerations of a different order depending upon whether a state or a federal statute is involved", 361 U.S. at 170, and it is clear from the subsequent decision by Justice Harlan in *Manual Enterprises, Inc. v. Day*, 370 U.S.478, that in federal prosecutions Justice Harlan would require proof of knowledge of obscenity as a standard for judging *scienter*.

In *Manual Enterprises, Inc. v. Day*, 370 U.S.478, the question posed by Justice Harlan was whether 18 U.S.C. §1461 could be construed as not requiring proof that the publishers knew that some of their advertisers were offering to sell obscene materials. It was conceded that *scienter* was required in a criminal prosecution under §1461, but the government contended that such requirement was unnecessary in a civil proceeding. Justice Harlan rejected the argument of the government. It was held that Congress could not have intended, and that it was probably constitutionally impermissible, to hold the publisher civilly responsible for the advertisements of the material, in the absence of any showing that he knew that the character of such material

was offensive. The government made the additional argument that some of the publishers' magazines contained notations which appeared to give some indication that the publishers were familiar with the work of the advertisers. Nevertheless, the Court held that "this cannot well be taken as an admission of *knowledge* that the advertisers' works were *obscene*". 370 U.S. at 493, fn. 16 (emphasis added).

In *Mishkin v. New York*, 383 U.S.502, a claim was made that the New York obscenity statute was constitutionally invalid because of the lack of requirement of *scienter*. In rejecting this argument, the Court observed that the same statute had been previously construed by the highest court of the State (*People v. Finkelstein*, 9 N.Y.2d 342, 214 N.Y.S.2d 363, 174 N.E.2d 470 [1961]) to require the "vital element of scienter". The Court noted that the state court in *Finkelstein* had defined "scienter" in the following terms: "A reading of the statute [§1141] as a whole clearly indicates that only those who are in some manner aware of the *character* of the material they attempt to distribute should be punished. It is not innocent but *calculated purveyance* of filth which is exorcised." Justice Brennan, in quoting the aforesaid construction by the state court, added the emphasis which appears in the quotation.

The State, in *Finkelstein*, had argued that *scienter* in obscenity prosecutions meant no more than knowledge of "contents" of the material, apparently taking out of context the use of the same word by Justice Brennan, in *Smith v. California*. To clarify this issue, Justice Brennan, in *Mishkin*, not only emphasized that there must be an *intentional purveyance* of obscenity,

but that the use of the words "knowledge of the contents" of the material, by a state court judge in a subsequent opinion in the same *Finkelstein* case, could not be considered "as a modification of this definition of scienter" which had been enunciated by the state court in its first opinion. 383 U.S. at 510, fn. 9. Justice Brennan added the following: "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." 383 U.S. at 511.

Finally, in *Ginsberg v. New York*, 390 U.S.629, where the validity of a statute specifically prohibiting sales to minors of obscene materials harmful to them was upheld, the *scienter* requirement included proof of knowledge of "the character and content of any material described herein". Justice Brennan referred again to the decision in *Mishkin*, emphasizing the state court's interpretation of the *scienter* requirement (*People v. Finkelstein*) as meaning that it was not innocent but *calculated* purveyance of obscene materials which was forbidden. Justice Brennan noted that the attention of the New York legislature had been directed to the state court decision defining the nature of *scienter* as required to sustain the statute. The Justice therefore concluded that it was reasonable to infer that the reference in the statutory provision "to knowledge of the *character* and content of any material described herein" incorporated "the gloss given the term 'character' in People v. Finkelstein". 390 U.S. at 644.

With deference, this review of past decisions by the Court indicates that a majority of the Court has always felt that the standard for judging *scienter* in ob-

scenity prosecutions includes, at the very least, proof both of knowledge of the contents of the material and awareness of the obscene character of the material. The stress has constantly been on *calculated* purveyance of obscenity, and not the mere knowing dissemination of material dealing with sex.

D. Petitioners therefore discuss at this point the basic question presented on the issue of *scienter*, to wit, what are the requisite constitutional standards pertaining to the scope of *scienter* in obscenity prosecutions? Petitioners are addressing themselves at this stage to the question of the applicable law, to the law of the case, to the instructions which a trial court is required to give to a jury in an obscenity prosecution. The discussion here is concerned with the legal standard for judging *scienter*, and not with the quality or quantity of proof required to make prosecutions for obscenity constitutional. This distribution was glossed over by the courts below, but petitioners submit that the distinction is fundamental and significant. If a court does not define the elements of the offense with which an accused is charged and being tried, the jury is given no opportunity of applying the facts to the law. The submission of a case to a jury without accurately defining the offense charged and its elements is a grave error. "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial." *Screws v. United States*, 325 U.S.91, 107. See also, *Bollenbach v. United States*, 326 U.S.607, 613-614; *United States v. O'Dell*, 462 F.2d 224 (6 Cir. 1972); *United States v. Mus-*

grave, 444 F.2d 755, 763-765 (5 Cir. 1971); *United States v. Squires*, 440 F.2d 859 (2 Cir. 1971); *United States v. Krosky*, 418 F.2d 65, 67-68 (6 Cir. 1969); *Byrd v. United States*, 342 F.2d 939 (D.C. Cir. 1965); *Morris v. United States*, 156 F.2d 525 (9 Cir. 1946); Wright, Federal Practice and Procedure: Criminal §487; 53 Am.Jur, Trial §545.

The statute here, at the time the judgments of conviction were rendered, made it an offense to use the mails for the mailing of *obscene* material. The indictment charged petitioners with conspiring to mail, and mailing, an *obscene* book and advertisement. The case was tried under the *Roth-Memoirs* standards for judging obscenity. In short, the only offense proscribed in 18 U.S.C. §1461, and the only offense charged in the indictment, was the mailing of a book and advertisement which were allegedly patently offensive because they affronted contemporary community standards relating to the description or representation of sexual matters; the dominant theme of the material, taken as a whole, appealed to a prurient interest in sex; and the material was utterly without redeeming social value. These were, in accordance with decisions of this Court, the elements of the offense which were required to coalesce and to be established by the prosecution.[10]

One is ordinarily not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. In *Morissette v. United States*, 342 U.S.246, 270-271, the defendant was convicted of

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[10]In promulgating the Miller standards, the majority opinion referred to the issues of "community standards", "prurient interest" and "patent offensiveness" as "essentially questions of fact" (93 S.Ct.2618), a recognition that these standards, together with "conduct specifically defined by the applicable state law", constitute the essential elements of the offense.

knowingly converting to his own use property of the United States. In holding that criminal intent was an essential element of the crime, Justice Jackson, writing for a unanimous Court, made the following statement:

> "Had the statute applied to conversions without qualification, it would have made crimes of all unwitting, inadvertent and unintended conversions. Knowledge, of course, is not identical with intent and may not have been the most apt words of limitation. But knowing conversion requires more than knowledge that defendant was taking the property into his possession. *He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion.* In the case before us, whether the mental element that Congress required be spoken of as knowledge or as intent, would not seem to alter its bearing on guilt. For it is not apparent how Morissette could have knowingly or intentionally converted property that he did not know could be converted, as would be the case if it was in fact abandoned or if he truly believed it to be abandoned and unwanted property." (Emphasis added).

The statute here does not apply to all materials dealing with sex. It applies only to materials whose contents are *obscene*. It is impossible, it is submitted, to ascribe culpability to an accused in an obscenity prosecution when the proof allegedly shows only that the accused knew the "contents" of the material, or only knew that the contents dealt with "sex". In the case herein, the jury was specifically instructed that proof of knowledge of obscenity or belief in non-obscenity was entirely irrelevant. The court specifically refused

to instruct the jury that the proof required was knowledge of the contents together with awareness of the *obscene* nature and character of the contents. Thus, petitioners were charged in the indictment with knowingly mailing *obscene* material, and convicted of knowingly mailing material *dealing with sex.*

Petitioners do not contend that proof of knowledge of the existence or meaning of the obscenity law on the part of an accused is necessary in an obscenity prosecution. Petitioners do contend that proof, in order to establish culpability, must show that the accused knew the contents of the material he was disseminating and was in some manner aware that the material went beyond accepted contemporary standards in the depiction or representation of sex, appealed to a prurient interest, and was utterly without any social value or importance. If such knowledge and awareness is established, and the material is disseminated with specific intent to appeal to the prurient interest of the recipients, then the *mens rea* or *scienter* may be deemed established. The proof with respect to an accused's state of mind may be direct or circumstantial; but the standard for determining *scienter* must always be, it is submitted, knowledge of the essential facts which bring the obscenity law into play. It is not necessary to establish, for example, that the accused knew that the Court had promulgated a "prurient interest" test. It is essential that the prosecution prove that the accused knew that the material disseminated by him appealed to a prurient interest and that the accused intended by such dissemination to appeal to such interest.

There is virtually no area of the criminal law in which the general *mens rea* requirements for the establishment of liability do not include proof that an ac-

cused acted purposely and knowingly with respect to each material element of the offense. Certainly this is true where the offense is deemed a felony and carries heavy penalties of fine and imprisonment. A partial list of cases would include the following: *United States v. Jiminez-Serrato*, 451 F.2d 523 (5 Cir. 1971) (one charged with passing counterfeit bills under 18 U.S.C. §472 cannot be convicted without proof that the accused knew the *counterfeit* nature of the bills); *United States v. Gardner*, 171 F.2d 753 (7 Cir. 1948) (an agreement to transport a motor vehicle in interstate commerce without knowledge that it was stolen, or an agreement to transport or cause to be transported checks in interstate commerce without knowledge that they were fraudulent or forged, would not constitute a criminal conspiracy); *United States v. Nitti*, 444 F.2d 1056 (7 Cir. 1971) (without knowledge on the part of the defendant that property was "stolen", the charge that defendant was in possession of such stolen property could not be maintained); *Fulbright v. United States*, 91 F.2d 210 (8 Cir. 1937) (while the proof showed harboring, it failed to establish the requisite knowledge that the federal warrants had been issued for the arrest of the criminals); *United States v. Gallishaw*, 428 F.2d 760 (2 Cir. 1970) (erroneous instructions permitted conviction for aiding and abetting robbery of a bank without proof that the accused knew a bank was to be robbed); *United States v. Fields*, 466 F.2d 119 (2 Cir. 1972) (the trial court failed to instruct that the government had to prove that the defendants "actually knew" that the material in tractor trailer was stolen property); *United States v. Spingola*, 464 F.2d 909 (7 Cir. 1972) (the instructions of the trial court never made clear that "negligent failure"

to timely file would not constitute a "wilful failure" to file, thus precluding the jury's consideration of impossibility or other justifiable excuse as a defense).

See also, *United States v. Murdock*, 290 U.S.389; *Spies v. United States*, 317 U.S.492; *United States v. Bishop*, 412 U.S.346; Model Penal Code, Tentative Draft No. 4 (1955) pages 12-18, 123-139; Abelson & Crow, "The Scienter Element in California's Obscenity Laws: Is There a Way to Know?", in 24 Hastings Law Journal 1303-1325 (1973); Copes, "The Mens Rea Provisions of the Proposed Ohio Criminal Code—The Continuing Uncertainty", in 33 Ohio State Law Journal 354-396 (1972).

Moreover, unlike the ordinary criminal prosecution, obscenity prosecutions implicate First Amendment questions. An obscenity prosecution deals with forms of expression, with communication, with subject matter ordinarily entitled to the free speech and press protections of the Constitution. The separation of constitutionally protected material from that which is not entitled to constitutional protection is one of great societal importance. Concededly, such terms as "community standards", "prurient interest", "utterly without redeeming social value", or lacking "serious literary, artistic, political or scientific value", contain a considerable degree of residual ambiguity. It is therefore essential to avoid any mistakes in fact finding by requiring clear and unequivocal evidence of guilty knowledge as well as an intention based upon such knowledge to do the acts which constitute the harm against which the law is directed. See, *United States v. Falcone*, 311 U.S. 205; *Estep v. United States*, 140 F.2d 40, 45 (10 Cir. 1943).

In *Screws v. United States*, 325 U.S.91, an indictment was rendered against certain police officers, charging them with a violation of federal statutes which made it an offense to deprive any person of rights, privileges or immunities secured or protected by the Constitution and laws of the United States. The statute was challenged as being unconstitutionally vague because essentially it punished any violation of the Due Process Clause of the Fourteenth Amendment, and it was argued that the Due Process Clause has received such broad and fluid definitions that the statute provided, as a result, no ascertainable standard of guilt.

> ". . . Under that test a local law enforcement officer violates §20 and commits a federal offense for which he can be sent to the penitentiary if he does an act which some court later holds deprives a person of due process of law. And he is a criminal though his motive was pure and though his purpose was unrelated to the disregard of any constitutional guarantee. The treacherous ground on which state officials—police, prosecutors, legislators, and judges—would walk is indicated by the character and closeness of the decisions of this Court interpreting the due process clause of the Fourteenth Amendment." 325 U.S. at 97.

This Court recognized the injustice of the enforcement of the federal statute involved in *Screws* if construed to only require proof of a general criminal intent. The Court held that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague statute invalid. "The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is

in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware". 325 U.S. at 102. Thus, the Court held that the word willfully in the statute must be construed as connoting a purpose to deprive a person of a specific constitutional right.

> "The difficulty here is that this question of intent was not submitted to the jury with the proper instructions. The court charged that petitioners acted illegally if they applied more force than was necessary to make the arrest effectual or to protect themselves from the prisoner's alleged assault. But in view of our construction of the word 'willfully' the jury should have been further instructed that it was not sufficient that petitioners had a generally bad purpose. To convict it was necessary for them to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e.g. the right to be tried by a court rather than by ordeal. And in determining whether that requisite bad purpose was present the jury would be entitled to consider all the attendant circumstances—the malice of petitioners, the weapons used in the assault, its character and duration, the provocation, if any, and the like." 325 U.S. at 106-107.

See also, *Dennis v. United States*, 341 U.S.494; *Hartzel v. United States*, 322 U.S.680.

In *New York Times Co. v. Sullivan*, 376 U.S.254, this Court recalled the historic statement that "It is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing

public characters and measures". 376 U.S. at 275, n. 15. The Court held that the rule applied by the Alabama courts which resulted in a judgment following a jury verdict awarding damages in the sum of $500,000.00 "is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct. We further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent". 376 U.S. at 264-265. This Court held that "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct" (376 U.S. at 273), and that the state rule of law with respect to libel could not be saved by its allowance of the defense of truth.

> ". . . A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which, in Smith v. California, 361 U.S.147, 80 S.Ct.215, 4 L.Ed. 2d 205, we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale." 376 U.S. at 278.

The Court concluded that the constitutional guarantees of the First Amendment require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct "unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not". 376 U.S. at 279-280.

It is anomalous, it is submitted, that false and libelous utterances with respect to public officials or public issues should receive the high protection accorded by the ruling of the Court in *New York Times Co.*, while the liberty to discuss and inform and educate the public with respect to such matters of human interest as sex and sexual relations is undermined by the virtual elimination of any *scienter* requirement. If the constitutional guarantee of freedoms of speech and press with respect to issues of sex are to be preserved, then, it is submitted, an essential element of the offense in obscenity prosecutions is proof beyond a reasonable doubt that the accused knew the contents of the material involved, was aware of the obscene character of the contents, and disseminated the material with specific intent to appeal to the prurient interest.

The courts below adopted a standard for judging obscenity, to wit, knowledge of the contents of the material, which virtually eliminates any *scienter* requirement and restores the rule of absolute criminal liability. The government has never contended and does not claim that any of these petitioners was in any manner aware of the operative facts which bring the provisions of 18 U.S.C. §§371 or 1461 into play. In short, there was never any attempt to prove that these petitioners had any knowledge that the brochure allegedly exceeded contemporary community standards, or appealed to prurient interest, or was utterly without social value. There was no attempt to prove that these petitioners acted in reckless disregard of whether or not the brochure allegedly fell within the purview of the federal obscenity statute. There was no proof that these petitioners even intended to commit a public wrong. The jury was permitted to find culpability without a con-

stitutionally permissible standard for judging *scienter* and, as appears hereafter, without proof of culpability on the part of these petitioners, or any of them.

Moreover, the standards for judging *scienter* would not be complete, it is submitted, without providing that an accused's honest belief that the known contents of material are not obscene should constitute a defense in an obscenity prosecution. The importance of encouraging dissemination of constitutionally protected material justifies the enunciation of such a rule. See, Lockhart & McClure, "Censorship of Obscenity: The Developing Constitutional Standards", in 45 Minnesota Law Review 5, 106-108 (1960). While the question of the honesty of an accused's belief in the non-obscenity of material is always a matter for the trier of the facts to decide, it is submitted that it would be arbitrary and capricious, as well as harmful to the exercise of freedoms of speech and press, to deprive an accused of a defense of honest belief that the material was not obscene. The deprivation of such a defense would also result in self-censorship in the face of absolute criminal liability, with resultant injury to the public's access to constitutionally protected material.[11]

E. The argument that proof of mere "knowledge of contents" is sufficient to support a judgment of con-

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[11]The indictment failed to particularize the constitutionally requisite element of *scienter*. The trial court itself, in pretrial proceedings, recognized that the word "knowingly" in the indictment could have many meanings [R.T. Vol. C, 78]. See, *Russell v. United States*, 369 U.S.749; *Pettibone v. United States*, 148 U.S.197; *United States v. Carll*, 105 U.S.611; *United States v. Denman*, 483 F.2d 1093, 1097 (8 Cir. 1973). See also, *Rabe v. Washington*, 405 U.S.13; *DeJonge v. Oregon*, 299 U.S.353, 362; *Cole v. Arkansas*, 333 U.S.196. Even the Grand Jury was presented with no evidence on the essential element of *scienter* except corporate records [R.T. Vol. D, 20].

viction in a federal obscenity prosecution is without support in reason or logic. In the first place, if it is argued that a jury may reasonably infer knowledge of *obscenity* merely from proof of *knowledge of contents*, then the judgments of conviction in the case herein would nevertheless be invalid because the jury was never instructed that they were required to find knowledge of obscenity on the part of the petitioners.

In the second place, knowledge of the contents of a publication dealing with sex cannot possibly be the equivalent of knowledge of the alleged obscenity of the publication. The mere proof that a publisher or editor knew the contents of the newspaper involved in *Kois v. Wisconsin*, 408 U.S.229, could in no way establish that such publisher or editor knew that the newspaper was obscene, as the judgment of this Court, reversing the holding of the Wisconsin Supreme Court, makes amply clear. Knowledge of the contents of the magazines and films involved in *Wiener v. California*, 404 U.S.988, and *Hartstein v. Missouri*, 404 U.S.988, did not establish that the publishers or distributors of such material knew that it was obscene. Proof that publishers, producers, exhibitors, distributors, or others similarly situated, knew the contents of the multifold books, magazines and films ultimately held to be entitled to constitutional protection by this Court and other courts plainly fails to establish that such persons knew the material was "obscene".

Further, empirical studies indicate that it is unreasonable to assume knowledge of obscenity solely from proof of knowledge of contents or character of the material. As aforementioned, persons have been repeatedly arrested, tried and convicted under obscenity statutes, only to have their convictions overturned

by federal and state courts because in the opinion of such courts the material involved was not, in fact, obscene. Even persons with extensive legal training and experience with obscenity laws "feel hamstrung by the gaping uncertainties which permeate the subject". Abelson & Crow, "The Scienter Element in California Obscenity Laws: Is There a Way to Know?", in 24 Hastings Law Journal at 1318. Nor can a person determine obscenity by knowledge of contents by "reference to the pattern of enforcement of obscenity laws". *Ibid.*, p.1318. Even the prosecutorial arm of the government is not always certain as to whether the contents of material constitutes obscenity. The fact is that "judges, juries, prosecutors, defense attorneys, and the police are often uncertain or in error as to the obscenity *vel non* of a particular film or book". *Ibid.*, at 1321.

If an accused may be convicted without any proof that he knew that the material was obscene, and without any possibility of establishing in his own defense his honest ignorance that the material was obscene, then the trial of an obscenity prosecution becomes inherently unfair, and the right to confront witnesses, to present evidence in one's own behalf, and to have the assistance of counsel and a determination by an impartial jury become meaningless. Such a determination by a jury, based on its own subjective predilections, is no more than an *ex post facto* determination which visits upon the accused cruel and unusual punishment in the most primary sense of the terms.

The notion that everyone "must take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd and lascivious" has been rendered un-

tenable by the decisions of this Court since *Roth*, through *Jacobellis*, *Memoirs*, *Ginzburg*, *Redrup*, *Stanley*, and the June 21 decisions, as well as by the changing social conditions, attitudes, and sexual revolution of the past decades. See, *Griswold v. Connecticut*, 381 U.S.479; *Eisenstadt v. Baird*, 405 U.S.438; *Doe v. Bolton*, 410 U.S.179; *Roe v. Wade*, 410 U.S.113; *United States v. Klaw*, *Commission on Obscenity and Pornography*, September 1970.

With due deference, it is time to recognize that the epigram contained in the *Rosen* opinion rendered in 1896 has lost its viability. The standards for judging obscenity in *Rosen* were the *Hicklin* standards, "judging obscenity by the effect of isolated passages upon the most susceptible persons". *Roth v. United States*, 354 U.S. at 489. Under such a test, virtually any expression contained in a book or other medium of communication might be deemed "obscene" by a court or jury. But this Court has held that the *Hicklin* test "must be rejected as unconstitutionally restrictive of the freedoms of speech and press". 354 U.S. at 489. Moreover, the *Rosen* decision was rendered long before the developing standards with respect to freedoms of speech and press had been enunciated by this Court.

The issue today cannot be notice of what is meant "by decency, purity and chastity in social life". The issue today is what expression dealing with sex is entitled to the protective guarantees of free speech and press contained in the First Amendment, and what expression pertaining to sex is not so protected because the expression exceeds contemporary community standards, appeals to prurient interest, and is utterly without redeeming social importance, or lacks serious literary, artistic,

political or scientific value. It cannot be reasonably argued that everyone must know today what is or what is not obscene expression, when the courts as well as the community are in complete disagreement as to where and how the line should be drawn. See the dissenting opinions in the *Miller* and related cases of June 21 and June 25, 1973; *United States v. Friedman*, ... F.2d .... (10 Cir. Nos. 72-1143-1144, December 11, 1973); *United States v. Palladino*, F.2d .... (1 Cir. No. 72-1005, January 5, 1974); *United States v. Henson*, ... F.2d .... (9 Cir. No. 73-2063, October 5, 1973); Leventhal, "The 1973 Round of Obscenity-Pornography Decisions", in 59 American Bar Association J. 1261-1266 (1973); *Report of the Commission on Obscenity and Pornography* 358-362 (1970); Johnson, "The Pornography Report: Epistemology, Methodology and Ideology", in 10 Duquesne Law Review 190-219 (1971).

It cannot be denied that the standards for judging obscenity are not based upon common experience nor capable of objective measurement. The standards rely upon subjective moral, aesthetic, sociological and psychological determinations by those charged with application of the law. The test for judging obscenity does not even depend upon the proof of any alleged damages or harmful effects. It deals with judgment relative to "appeal of material", "patent offensiveness", and "social values". Such standards cannot possibly be presumed to be known merely from knowledge of the contents of particular publications. To draw such a presumption is to unfairly convict persons who honestly believed they were not disseminating material later held to be obscene. Moreover, the existence of such a presumption can only induce self-censorship and make ma-

terial entirely protected by the Constitution unavailable to the public.

If *Rosen* was intended to imply that "judicial notice" is sufficient to replace proof of culpability, then, it is submitted, a constitutional infirmity is clearly presented, for such type of notice would be a deprivation of due process, a failure to protect the individual against arbitrary action. In *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S.292, the Court stated: "The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record . . . This is not the fair hearing essential to due process. It is condemnation without trial . . . to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial . . . This will never do if hearings and appeals are to be more than empty forms." 301 U.S. at 300-302.

The presumption that everyone knows what is meant by "decency, purity and chastity" and what must be deemed "obscene, lewd and lascivious" is an irrational presumption, especially so since under the rulings of the courts below such presumption has been made irrebuttable and conclusive. Congress has never created such a presumption, and this Court has held that "incriminating presumptions are not to be improvised by the judiciary". *Morissette v. United States*, 342 U.S. 246, 275. The *Rosen* presumption, if adopted today, effectively eliminates all *scienter* as an ingredient of the offense. It is unreasonable, it is submitted, for a trial court to even instruct a jury that knowledge of obscenity can be inferred merely from proof of knowledge of

contents, and it is error to refuse to instruct a jury that such an inference cannot be drawn. Once it is accepted that a significant proportion of the community does not know and cannot know, merely from examining the contents of material, that such material exceeds contemporary standards, appeals to prurient interest, and is utterly without value, then there can no longer be conviction under the federal obscenity statute without proof that the particular accused was so aware. See, *Leary v. United States*, 395 U.S.6, 37-54. See also, *Tot v. United States*, 319 U.S.463; *Manley v. Georgia*, 279 U.S.1; *Bailey v. Alabama*, 219 U.S.219; *Eastern & Atl. R. Co. v. Henderson*, 279 U.S.639.

F. It is constantly urged by prosecutors that prescribing the constitutional standards for judging *scienter*, as heretofore discussed, would make it difficult to prove the requisite *scienter* and obtain convictions. It is argued that a "flood" of obscene materials will inundate the mails unless the *scienter* requirement is so diluted as to virtually eliminate this element of the offense. There is no empirical evidence to support these assertions by prosecutors, and in fact the evidence is quite to the contrary.

This Court stated in *Smith v. California*, 361 U.S. 147, 154: "We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind." In *United States v. Stagman*, 446 F.2d 489 (6 Cir. 1971), where the court interpreted 18 U.S.C. §1952 as requiring

proof of knowledge and specific intent to carry on an unlawful activity, the argument was made by the prosecution that such decision imposed "additional burdens on federal prosecutors seeking to extirpate organized crime operating across state lines". 446 F.2d at 493. The Court of Appeals replied: "Juries are regularly required to find a *mens rea* element in prosecutions under other statutes involving interstate activity such as the Dyer Act, 18 U.S.C. §2312, and the Mann Act, 18 U.S.C. §§2421 et seq., and there appears no reason why they would have any special difficulty under our construction of this legislation." 446 F.2d at 494.

If prosecutors are required to prove an intent to overthrow the government as speedily as circumstances will permit; an intent to pass counterfeit bills, knowing the same to be counterfeit; an intent to receive stolen property in interstate commerce, knowing the same to have been stolen; or an intent to steal or knowingly convert property belonging to the United States, there does not appear to be any reason to suppose any greater difficulty in proving knowledge of the obscene contents of material. A study of the results in federal and state obscenity prosecutions has led to the conclusion that "prosecutors have had absolutely no difficulty in proving the requisite scienter", even where such requisite included proof of the obscene nature of the materials involved. Note, "The Scienter Requirement in Criminal Obscenity Prosecutions", in 41 New York University L.Rev. 790-791 (1966).

It is submitted that the interests in the protection of freedom of speech and press and the right of the public to be informed on all matters of human interest far outweigh the arguments of "judicial notice", "irrebuttable presumptions", and "prosecutorial convenience" which are advanced against the enunciation of constitutionally requisite standards for judging obscenity. If First Amendment and due process guarantees are to depend on jury verdicts, then, it is submitted, the jury should have before it substantial evidence establishing that the accused knew the contents of the material, was aware of the obscene nature and character of the material and, with such guilty knowledge, disseminated the material with the specific intent to appeal to a prurient interest. An accused in an obscenity prosecution, like any other criminal prosecution, is entitled to the presumption of innocence and entitled to have the prosecution prove, beyond a reasonable doubt, every essential element of the offense. If the *scienter* requirement of the federal obscenity statute is defined merely as "knowledge of contents", then the statute, so construed and applied, unreasonably threatens material entitled to constitutional protection. The introduction of strict criminal liability into obscenity prosecutions will bring the excessive and unnecessary self-censorship so detrimental to the public's access to constitutionally protected material.

II.

The Record Is Barren of Any Evidence to Establish That Petitioners, or Any of Them, Knew the Contents of the Brochure. There Is No Evidence in the Record to Establish That Petitioners Corruptly Conspired to Violate the Federal Obscenity Statute by Mailing or Causing to Be Mailed the Alleged Obscene Brochure. There Is No Evidence in the Record to Establish That Petitioners Knowingly Mailed or Caused to Be Mailed or Aided and Abetted the Mailing of the Said Brochure. 18 U.S.C. §§2, 371 and 1461, as Construed and Applied to Authorize the Judgments of Conviction Herein Violate the Free Speech and Press, Due Process, Fair Trial and Cruel and Unusual Punishment Provisions of the First, Fifth, Sixth and Eighth Amendments.

A. There has never been any claim by the Government that it proved the individual petitioners, or the corporate petitioners, knew that the brochure or advertisement was obscene as alleged in the Indictment. There has never been a claim that petitioners intentionally mailed the brochure with such knowledge, or that the mailing of the brochure was accompanied by any intent of the petitioners to appeal to a prurient interest.

Petitioners have previously discussed what petitioners submit are the requisite constitutional standards for judging scienter in federal obscenity prosecutions. Nevertheless, even on the Government's own theory that all that was required was proof of "knowledge of the contents" of the brochure, the petitioners submit that there is no relevant evidence in the record to show that any of the petitioners knew the contents of the brochure or advertisement or knew the so-called

nature and character of the contents at the times when the brochure was mailed as alleged in the Indictment.

The only evidence offered by the Government was the insertion of the brochures by the Academy Addressing and Mailing Service in North Hollywood, California, some 200 miles from the location of the business enterprise in San Diego. The brochures were brought to the mailing service by employees of an organization known as Regent House, also located in North Hollywood. The witnesses who testified for the Government from Academy Addressing and Mailing Service both testified that they knew nothing about the corporate petitioners herein nor had they had any dealings with nor did they know any of the individual petitioners. The billings were to Regent House from Academy Addressing and Mailing. There is not the slightest evidence in the record that these petitioners, or any of them, were in any way responsible for the preparation of the contents of the advertisement or its mailing. The Government never called any representative of Regent House or any representative of the printer of the brochure, also located in North Hollywood. The only evidence was a check from Reed Enterprises to Regent House and another to London Press, Inc., the printer, bearing the signature of petitioner Hamling.

The evidence is completely lacking that any of the individual petitioners personally prepared or mailed the brochure. There is no evidence, direct or circumstantial, probative of the crucial element of the offense as charged by the Government, to wit, that each of these petitioners knew the contents of the particular brochure alleged in the Indictment.

All that the Government did in this case was to introduce the articles of incorporation of the various

corporate petitioners, certificates of amendments to the articles of incorporation, minutes of meetings of the board of directors, applications for post office boxes, bank signature cards, shipping memorandums and invoices, postage meter license permits, and other related documentary testimony dealing with normal intra-corporate activities. This evidence, however, showed no more than that petitioners were engaged in a lawful enterprise; that petitioners were engaged in an open and innocent business. None of this evidence was probative of the vital element of scienter, to wit, each of the petitioners' state of mind, each of the petitioners' "knowledge of the contents" of the specific brochure, this on the Government's theory of the case. See, *Vachon v. New Hampshire*, ... U.S. .... (Oct. Term, 1973, No. 73-573 decided January 14, 1974). See also, *Keegan v. United States*, 325 U.S.478; *Baumgartner v. United States*, 322 U.S.665, 677; *Tot v. United States*, 319 U.S.463, 473; *Fiske v. Kansas*, 274 U.S. 380, 386; *Bailey v. Alabama*, 219 U.S.219; *United States v. Roberts*, 465 F.2d 1373 (6 Cir. 1972); *United States v. Lynn*, 461 F.2d 759 (10 Cir. 1972).

With respect to the petitioner David L. Thomas, there is no evidence in the record, it is submitted, which would justify the slightest finding in reason that this petitioner had any connection with the preparation or mailing of the advertisement or that he in any way knew the "contents" or the "nature and character" of the advertisement. Petitioner Thomas was listed in some of the corporate documents offered by the Government as a vice-president of the various corporations when he signed bank signature cards or license applications, and the like. There was no other evidence against this petitioner, oral or documentary. There was

not the slightest evidence in the record that petitioner Thomas had anything to do with the advertisement.

The evidence in connection with the advertisement, insofar as petitioner Shirley Wright is concerned, is in similar fashion entirely negative. The government documents, which covered a period back to 1965 and prior thereto, appeared to indicate that Shirley Wright was in the employ of some of the corporations at such times; that she was listed as an officer and a member of the Board of Directors of several of the corporations; that she signed waivers of notices of meetings and signed as an officer of the corporation. In most instances she was designated secretary or secretary-treasurer, and it is apparent that she did the work of a secretary and office manager in the business of Reed Enterprises, Inc. There is no evidence to indicate that she received a salary as an officer or remuneration for attending meetings of the Board, and a reasonable inference is that much of the official designation was for the convenience of her employer. There is nothing in the documentary evidence to indicate in any way that petitioner Wright was at all involved in any way in anything else than office management. Insofar as the advertisement is concerned, there is again not the slightest evidence to indicate that she knew anything about the mailing of the brochure, the preparation of the advertisement, or that she in any way knew anything about the "contents" or the alleged "nature and character" of the contents of the said advertisement.

Insofar as the petitioner Earl Kemp's relationship with the advertising brochure here involved is concerned, the evidence is similarly barren. The only evidence to which the court below could point was that petitioner Kemp had one time signed a postal

service document for a rental of a post office box, No. 20308, on behalf of petitioner Library Service, Inc. The fact is, as the record clearly reveals, petitioner Kemp's only activity as shown in the record was that he served as editor of the Illustrated Report, upon the alleged obscenity of which the jury could not agree. The record clearly reveals that the post office box had already been in the name of Library Service, Inc. sometime prior to the date when petitioner Kemp affixed his signature; that as a result of the urging of a postal inspector who conducted the investigation which led to the prosecution herein, a post office employee was sent to San Diego to insist that new signatures appear on the applications for the post office box; that petitioner Kemp was called out of his editorial office to sign an application at the instance of the postal employee; that petitioner Kemp did not know whether or not he held an officership in Library Service, Inc.; that he was informed that he was occupying the nominal position of vice-president and then signed as a mere formality [JA 137-146]. There was simply no evidence concerning petitioner Kemp which in any way indicated that he had anything to do with the preparation of the advertising brochure which emanated from a Regent House in North Hollywood, and there is no evidence to indicate that he had anything to do with the mailing or had any knowledge of the "contents" or "nature and character" of the contents of the material. In support of a motion for judgment of acquittal or, in the alternative, for a new trial and arrest of judgment [C.T. 1136-1139], the petitioner Kemp submitted a sworn affidavit indicating that he knew nothing concerning the preparation or contents of the advertisement and that, as a matter of fact, at

the time the brochure was allegedly prepared and mailed in North Hollywood petitioner Kemp was in Europe on a business trip.

With respect to petitioner Hamling, the only evidence in the record is a check from Reed Enterprises, Inc. to London Press, Inc. in the sum of $4,843.14, and another check from Reed Enterprises, Inc. to Regent House in the sum of $3,817.80, each signed by petitioner Hamling. There is no other evidence in the record that in any way, by act, declaration or statement, connects petitioner Hamling with the mailing of the brochure or with any knowledge of its contents or its nature and character.

With respect to the corporate petitioners, the sole evidence relating to Reed Enterprises, Inc. is the issuance of the two aforesaid checks, and the sole evidence relating to the corporate petitioner Library Service, Inc. is the appearance of its name on the brochure.

The petitioners were not charged with unlawfully renting a post office box, nor did the jury agree that mailing the Illustrated Report to the postal patrons responding to the advertisement was a violation of the federal obscenity law. There was no claim of illegality, nor could there be, in the fact that petitioners were officers of corporations or directors of corporations or that they acted in concert in the business of publishing and distributing books (Application A to Pet. for Writ of Cert., pp. 5-6, 24-25). Looking at the evidence in the light most favorable to the Government, the sole proof showed that the preparation, printing and mailing of the brochure herein involved took place in North Hollywood, California under the auspices of corpora-

tions and individuals unrelated to petitioners. The only witnesses offered by the Government testified that they knew none of the petitioners nor had even heard of petitioners.

That an accused is an officer in a corporation or a member of a board of directors or, as an officer of a corporation signs a check in payment of a bill, or is a secretary, or is an editor of a book, is not sufficient in itself, it is submitted, to prove that such accused knew the contents of a particular advertisement or brochure. The trial court itself instructed the jury as follows: "An officer of a corporation cannot be held criminally responsible for an act unless he personally or actually did the act or the acts were done by others at his direction or with his permission." [R.T. 4936]. If this be deemed the law of the case as given to the jury, there is simply no evidence in the record in the light of such standard to justify a finding that each of these petitioners knew the contents of the particular brochure here involved.

It is the general rule that it is essential to the criminal liability of the officer of a corporation that such officer actually and personally do the acts which constitute the offense, or that such acts be done by his personal direction or permission. 19 Am.Jur.2d, Corporations, §1391, page 786. In *United States v. Interstate Engineering Corp.*, 288 F.Supp.402, 412 (D.C. N.H. 1967), where the charge was using the mails to defraud, District Judge Wyzanski instructed the jury, among other things, as follows: "I want as a special word of caution to point out to you that this criminal case against the individual defendants does not involve with respect to the individual defendants as distin-

guished from the corporate defendants any theory of imputed knowledge or anything of that sort. That is to say, when you are considering whether an individual X knows about something, you are to consider whether he personally knows about it, not whether some salesman acting for him knows about it, not whether some associate knows about it. In this kind of criminal case, whatever may be rules of agency in civil matters, individuals are to be judged on the basis of their personalized individual knowledge." See also, *United States v. San Francisco Electrical Contractors Ass'n*, 57 F. Supp.57, 69 (D.C. Cal. 1944); *United States v. Buckley*, 49 F.Supp.993, 995-996 (D.C. D.C. 1943); *United States v. Food and Grocery Bureau of Southern California*, 43 F.Supp.966, 971, 973 (D.C. Cal. 1942).

The Court recently stated in *In re Winship*, 397 U.S. 358, 361-364, 367:

* * *

"Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required.

* * *

"The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'

* * *

"Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

* * *

See also, *Cool v. United States*, 409 U.S.100; *Speiser v. Randall*, 357 U.S.513, 526.

Moreover, it is important to note that under the Indictment the Government was required to establish beyond a reasonable doubt that each of these petitioners "did knowingly use, and cause to be used," the mails for the mailing of the brochure "from North Hollywood, California" to the specified recipients. In the light of the record made by the Government, it appears plain that there can be no claim that any of the petitioners here personally mailed the advertisement to the particular recipients from North Hollywood on the specific dates alleged in the Indictment. There is no proof in the record to establish that any of these petitioners "aided and abetted" such action. One does not aid and abet a particular mailing unless there is substantial evidence to establish beyond a reasonable doubt that the particular accused knowingly participated in such mailing. The Government was required to prove beyond a reasonable doubt that the person who is being aided and abetted is intentionally committing a crime; that the aider and abettor knows that the other is committing a crime; that the aider or abettor has the purpose to aid the other to commit the crime; and that the aider in fact rendered aid or assistance. These are

the elements which have to be established before an accused can be convicted of aiding and abetting another to commit a crime. There was simply no such evidence in the case herein with respect to each of the petitioners. See, *United States v. Townsend*, 474 F.2d 209 (5 Cir. 1973); *United States v. Williams*, 470 F.2d 1339 (8 Cir. 1973); *United States v. Hill*, 464 F.2d 1287 (8 Cir. 1972); *United States v. Docherty*, 468 F.2d 989 (2 Cir. 1972); *United States v. Garguilo*, 310 F.2d 249, 252-255 (2 Cir. 1962); *Grimes v. United States*, 379 F.2d 791 (5 Cir. 1967).

In similar fashion, there is no proof in the record in this criminal prosecution that these particular petitioners "caused" the mailings by Regent House from North Hollywood. In the context of a criminal statute, the word "causes" has a different meaning than that imparted to it in other areas of the law. The mere causal connection that might be sufficient to constitute proximate causation is not enough to impose criminal responsibility. Hall, *General Principles of Criminal Law*, 2d Ed. 1960, pages 254-257. The reason is that a criminal purpose or intent must accompany the causal nexus before conviction for a crime can be had. See, *United States v. Peoni*, 100 F.2d 401 (2 Cir. 1938).

In *Nicolopoulos v. United States*, 332 F.2d 247 (1 Cir. 1964), the defendant was convicted of conspiracy and the substantive offense of "causing the transportation of stolen firearms in interstate commerce knowing the same to have been stolen." The evidence showed clearly that the defendant purchased stolen firearms and knew that they were stolen. There was evidence also to indicate that subsequent to the time when defendant agreed to buy the stolen firearms, he was told that the guns had been stolen in another State. The

appellate court nevertheless held that there was no basis for a finding that the defendant had reason to know that the guns which he had purchased had been or were to be transported at the time the agreement was made. "Yet under this statute, whatever else may be required, it must be that 'causing' interstate transportation requires knowledge on the part of the defendant, or, at least, reasonable grounds to know, that his conduct involves, or will result in, such commerce . . . The testimony of a witness that subsequent to the event defendant told him the guns had been stolen in Troy, New Hampshire . . . is not evidence that defendant knew this fact at the time he agreed to buy them and thereby, allegedly 'caused' their transportation in interstate commerce." 332 F.2d at 248-249. See also, *Rosenberg v. United States*, 120 F.2d 935, 937 (10 Cir. 1941); *Brady v. United States*, 24 F.2d 399, 403 (8 Cir. 1928).

B. The record is barren of any proof supporting the charges made in Count 1 of the Indictment [JA 14-16], to wit, that petitioners "willfully and knowingly" conspired to violate the federal obscenity statute with the object of using the mails for delivery of an obscene advertisement. There was no proof that these petitioners, or any of them, entered into any corrupt agreement with any specific intent to violate the federal obscenity law, 18 U.S.C. §1461. When the government attempts to use the conspiracy weapon against publishers, distributors, corporations, officers, directors, employees, and other persons engaged in the normal activity of publication and distribution of media of communication ordinarily protected by the First Amendment, then such restraint "must be subjected to close analysis and critical judgment". *Speiser v. Randall*,

357 U.S. at 520. Especially is this true in the case herein, where the government's own documentary evidence showed open and normal business activities. The usual presumption is that such persons engaged in normal business activities take ordinary care of their own affairs, obey the law, and are innocent of any crime. ". . . criminality cannot be proved by proving innocence." *Langer v. United States*, 76 F.2d 817, 827 (8 Cir. 1935). See also, *Keegan v. United States*, 325 U.S.478.

It was the government's theory in the trial below that the only burden upon the government was to show that petitioners knowingly agreed "to mail out certain material", and that if the jury found the material to be obscene at the trial, then a "conspiracy to mail obscene material" had been established [R.T. 3065-3066]. Such a contention, of course, renders the federal obscenity statute, 18 U.S.C. §1461, vague, ambiguous, uncertain and overbroad, as construed and applied. See, *Speiser v. Randall*, 357 U.S.513; *Smith v. California*, 361 U.S.147.

The burden was upon the government to initially prove a corrupt agreement on the part of each of these petitioners. There was no such proof. The burden was also upon the government to prove that each of the petitioners entered into the corrupt agreement with a specific intent to violate the federal obscenity statute, or, as the precedents indicate, entered into the common purpose with knowledge that a violation of law would result from the commission of the contemplated act. The gist of the crime of conspiracy consists of a corrupt agreement between two or more individuals to do an unlawful act (18 U.S.C. §371). The fact that persons are associated together is never in itself proof

of a criminal conspiracy. Such association is often innocent. The criminal quality resides in the intention of the parties to the agreement. There must be proof of a specific intent to violate the law. Plainly, as the discussion hereinabove indicates, there is not the slightest evidence in the record by any act or declaration of any petitioner to indicate that the petitioners entered into an unlawful agreement with guilty knowledge and specific intent to violate the federal obscenity statute. There can be no such claim in the case herein.

The cases are uniform in holding that the essence of the offense of conspiracy lies in the intent; an intent to commit a specific unlawful act. The cases indicate that the existence of such a specific intent must be proved as a fact and is not presumed from the commission of an act. Thus, if the charge be conspiracy to use the mails for the delivery of an alleged obscene advertisement, there must be proof that each of the accused entered into such a corrupt agreement, knowing that such advertisement and mailing would violate the federal obscenity statute. Without proof of such specific guilty knowledge, no intent to violate the law is established. Moreover, the evidence of guilty knowledge must be clear, not equivocal, and this because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what is in effect a dragnet to draw in all substantive crimes. *Krulewitch v. United States*, 336 U.S.440, 445, 446, fn. 2; *Grunewald v. United States*, 353 U.S.391, 404; *United States v. Falcone*, 311 U.S.205; *United States v. Steele*, 469 F.2d 165 (10 Cir. 1972); *United States v. Jensen*, 462 F.2d 736 (8 Cir. 1972), opinion by Assoc. Justice Tom C. Clark; *Dennert v. United States*, 147 F.2d 286 (6 Cir. 1945); *Dahley v. United States*, 50 F.2d 37, 43, 46 (8 Cir. 1931).

III.

The Wholesale Exclusion of Constitutionally Relevant Evidence Proffered by Petitioners Deprived the Petitioners of a Fair Hearing and Fair Trial, an Opportunity to Be Heard and to Defend Against the Charges, With Resultant Deprivation of Petitioners' Liberty, Contrary to the Free Speech and Press, Due Process and Fair Trial Provisions of the First, Fifth and Sixth Amendments.

A. Prior to the trial, the petitioners requested the court to take judicial notice of comparable illustrated material held to be constitutionally protected expression by the Supreme Court of the United States, various courts of appeal, and federal district courts throughout the United States [C.T. 864-889]. The trial court stated: "I do not intend to make comparison because I do not think that is appropriate." [R.T. Vol. E 56]. On motion for discovery and inspection, the court itself raised the question of the "business of producing comparables" [R.T. 171] and stated that, "I think your proper procedure is through the testimony of experts, and I am going to—and I may as well tell you in advance—draw a very tight rein on the admissibility of evidence with regard to whether or not this is or is not obscene" [R.T. 172].

During the trial, while counsel for petitioners was cross-examining a government witness, a Mr. Urban, the owner of a newsstand in Dallas, Texas, the question was put to the witness as to whether he was familiar with the book *Sex and Marriage* [R.T. 644]. Upon objection by the prosecutor, the trial court stated to petitioners' counsel, "I am going to tell you right now, we are trying one thing, one thing only: this book. We are not trying all other books. We are not in-

troducing any comparables at this point in the trial or anything else" [R.T. 646]. An offer to prove through the witness that he had in his store hundreds of books containing pictures as explicit and candid in dealing with sex as those which were contained in the particular publication involved in the proceeds was rejected [R.T. 648-650]. The court stated that "proof of comparables" would have to be "on a national standard and they are going to have to be through experts, not through individuals" [R.T. 651].

In subsequent discussion on the issue of comparables, counsel for the petitioners pointed out that there were several categories of documentary evidence which the petitioners proposed to introduce. The first involved second-class mailing privileges; the second involved material that had been adjudicated by the courts to be constitutionally protected; and the third involved material openly available on the newsstands [R.T. 1963]. The court stated that it had not yet made up its mind with respect to the issue of comparables, but that "if, in fact, I do allow comparables in, it is going to be restricted to no more than three, if I allow it in at all, and then I am going to have to make the determination of which comparables or what types of comparables I am going to allow in" [R.T. 1964].

The prosecution called Frank Getline, an art critic for the *Washington Evening Star* [R.T. 2222], and offered the witness as an alleged expert on contemporary community standards dealing with matters of sex and nudity in "the visual communicative media" [R.T. 2233]. During the cross-examination of the witness, who had testified that he was familiar, generally, with material that is available in adult bookstores through-

out the country, counsel for the petitioners indicated to the trial court that counsel desired to show the witness two books which had been purchased in San Diego stores and which were available in adult bookstores throughout the country. The books were entitled *Animal Lovers* and *The Advanced Handbook of Swappers*, which counsel indicated depicted explicit sexual relations, including relations with animals [R.T. 2851]. Petitioners' counsel indicated that petitioners were prepared to show that books of this nature were available in cities throughout the country [R.T. 2852]. The trial court stated that the books were admissible "for the limited purpose of impeachment", but "I am not going to say that I will let it be put into evidence nor am I going to let it be shown to the jury" [R.T. 2854].

During the trial, the trial court definitively stated that the court would not take judicial notice of the adjudicated decisions, as counsel had requested [JA 157-158]. The court stated:

> "Finally, with respect to the matter of comparables, which we have talked about in recent times—it is the Court's opinion that the cases support the proposition that the Court is required to allow defense counsel to proceed in order to show the community standards involved, *either by comparables, by the introduction of comparables or by the introduction of expert witnesses with respect* to the elements to be shown. The Court finds and rules that *comparables will not be permitted for this reason:* primarily, they tend to confuse the jury. They tend to set up matters that I feel would serve no probative value in comparison to the amount of confusion and deluge of material that could result therefrom. * * *"

Formal objections to the ruling of the court were thereupon made by counsel for the petitioners [R.T. 3154-3161]. The contention of the petitioners was that the either/or ruling of the court denied the pertioners due process of law and denied petitioners their rights to protection under the First Amendment.

The petitioners called, on their behalf, witness W. Cody Wilson, who served as Executive Director for the Commission on Obscenity and Pornography [R.T. 3186-3208]. During the direct examination of the witness, petitioners' counsel asked the witness to verify that certain pictures containing sexual depictions had been used by various researchers retained by the Commission [R.T. 3380-3382]. The court stated: "Well, as far as the Court is concerned, these pictures are not going to be admitted, nor are they going to be marked." [R.T. 3382]. The witness Wilson was asked whether he had found any explicit sexual material, as defined by the Commission, available in the San Diego area [R.T. 3575-3576]. The witness replied that all such material was available [R.T. 3576]. The witness also testified that essentially the same kinds of material were found throughout the United States [R.T. 3577]. The witness was then shown the magazine "Animal Lovers" and a magazine "The Advanced Handbook of Swingers" [Deft. Exs. QQ, RR] and was asked whether the magazines had a reasonable degree of acceptance in the Nation as a whole. He stated that they had such acceptance, based on scientific studies, on his own personal conversations with people and his own knowledge. The witness was also shown three other exhibits [Deft. Exs. BC, BD, BE] and stated that they, too, on the basis of scientific studies and his own personal knowledge, have a reasonable degree of acceptance in

the Nation as a whole [R.T. 3578]. The exhibits were offered into evidence, and the trial court stated: "I see no need for it to come into evidence, Mr. Katz. They may be marked for identification, but there is no need for them to come into evidence." [R.T. 3579].

The petitioners offered the witness Virginia Carlson [R.T. 3922], a student of San Diego State University. Her special major included journalism, psychology and speech communication [R.T. 3923]. Under the supervision of Dr. Haberstroh, Assistant Professor of Advertising in the Journalism Department at San Diego State, who had previously testified [R.T. 3941], the witness conducted a survey of residents of San Diego to determine their reactions to *The Illustrated Report* and the advertising brochure [R.T. 3926]. The witness described the investigation she conducted in detail and the prepared questionnaire that was used, all of which petitioners offered to prove demonstrated that a majority of the residents were in favor of people reading the book, that they thought the book should be read, and that a substantial majority said the advertisement should also be available to the public in general [R.T. 3932]. The court stated that because a national standard was involved, the standards of San Diego were not relevant and the evidence was inadmissible [R.T. 3933], although the counsel for petitioners stated that additional experts were going to be brought in to talk about standards throughout the country and that material with respect to one area of the country was clearly relevant in finally determining the question of national community standards [R.T. 3941]. It was urged upon the court that the testimony supported a national survey that had actually been made by the Commission and that the testimony bore upon the question of lack

of prurient interest appeal [R.T. 3934-3947]. The trial court declined to permit the testimony of the witness or to admit either the questionnaire or the results of the study [Deft. Exs. BH, BI; R.T. 3937-3938].

Finally, after the petitioners rested, the court stated that it was now prepared to listen to argument "on the introduction of evidentiary matters, physical evidentiary matters" [JA 209]. Petitioners offered Exhibit A, the film which had been held to be constitutionally protected in *Pinkus v. Pitchess*, 429 F.2d 416 (9 Cir. 1970), aff'd 400 U.S.922. The petitioners offered two magazines entitled, respectively, "Togetherness" and "Flesh and Fantasy", which had been found to be not obscene by the United States Supreme Court [Deft. Exs. A-1, A-2; JA 210-211]. See, *Burgin v. South Carolina*, 404 U.S.806, rvsg. 178 S.E.2d 325. The court stated, "They may be marked. I am not going to permit them into evidence, Mr. Fleishman, but they may be marked. Nor am I going to permit the film into evidence."

The petitioners offered the magazine entitled "Nude Living No. 63" [Deft. Ex. II: JA 212-213], a magazine which had second-class mailing privileges and, it was urged, was comparable material which the jury should see. The court denied admission of the evidence [JA 213].

Petitioners offered Exhibits QQ and RR, the magazines entitled "Animal Lovers" and "The Advanced Handbook of Swingers" [JA 213-214], upon which there had been testimony from the prosecution witness Getline that similar material was found in adult bookstores in his informal survey and the witness W. Cody Wilson had stated that illustrations contained in the

magazine were contained in material in adult bookstores throughout the country. The material was offered on the question of customary standards in the light of acceptance by the community [JA 213-215]. The motion to admit the evidence was denied [JA 215].

The petitioners offered publications entitled "Deviant Sexual Behavior", "The Advanced Handbook of Oral Sex" and "Screw, The World's Greatest Newspaper" [Deft. Ex. BC; JA 215]. Admission of the evidence was denied [JA 215].

Petitioners offered into evidence three publications entitled "Couples", "Whipsters" and "Questions and Answers" [Deft. Exs. P, O, R; R.T. 4374].

The petitioners offered Exhibits JJ-1 through JJ-11, which were sex educational pamphlets, the covers of four of the said pamphlets having appeared in The Illustrated Report [R.T. 4374]. The motion to introduce the material was denied [R.T. 4376].

Petitioners offered Exhibits HH and GG, which were certain issues of "Playboy", the cover of one being identical to a picture in *The Illustrated Report*, and about which both prosecution and defense witnesses had testified on the issue of the value of using more than one picture to illustrate a point. The motion to admit the evidence was denied [R.T. 4377].

Petitioners again tendered Exhibits BG, BH and BI, which were the chart, the questionnaire and the results of the study conducted by defense witness Virginia Carlson [R.T. 4377]. The offer was rejected [RT. 4377].

Petitioners offered various still photographs, some fifteen different books, and a deck of playing cards,

as material which a Dr. James Howard had used in his study for the Commission [R.T. 4386, 4392-4393; Deft. Ex. BJ], all of which was rejected [R.T. 4393].

B. The trial court excluded an entire category of evidence offered by petitioners which bore importantly on the issues of obscenity and *scienter*. The Court stated that under no circumstances would it permit the jury to consider, nor would the Court itself consider, any comparison of the contents of the material involved in the prosecution with that of other comparable material openly published, widely distributed and generally accepted by the community. Thus, the jury was permitted to conclude that the material involved exceeded the limits of candor set by contemporary community standards without ever being permitted to receive evidence as to the kinds of explicit sexual material the community generally tolerates.

The Court of Appeals upheld the rulings of the trial court on the ground that the trial court, in the exercise of its discretion, had rejected the evidence because "they tend to confuse the jury"; because the mere fact that comparable material was sold and purchased in "book stores around the country does not make them witnesses of virtue"; and because the comparable materials offered by petitioners were not "relevant" and "had no logical or reasonable social value attributed to them" for the jury to consider in determining the obscenity or nonobscenity of the brochure.

These considerations overlook the fact that the trial court excluded all comparable material as an entire category. The trial court merely concluded that it would permit the introduction of evidence by petitioners in only one category, to wit, the testimony of experts, but

the jury was refused permission to examine the very books, magazines, pictures, etc., commonly accepted in the San Diego and national communities upon which the experts were commenting. The issue here, therefore, is not whether the comparable material would have been "confusing". The trial court could have always, of course, limited the amount of material submitted. The important issue is that all of the comparable testimony was excluded, without exception. It was for the jury to determine the weight to be given to such evidence; it was for the jury to determine whether the material was sufficiently comparable in all respects to the brochure under consideration. The trial court had before it reasonable alternatives with respect to the admission of the quantity of evidence offered by petitioners. There was no possible justification for wholly denying petitioners all opportunity to present an entire category of testimony in their defense, even to the extent of excluding comparable material held entitled to constitutional protection by this Court. The petitioners here were deprived of essential exculpatory testimony for no legitimate reason, it is submitted.

In *Smith v. California*, 361 U.S.147, Justice Harlan concurred with Justice Frankfurter that the trier of an obscenity case must take into account "contemporary community standards". Thus, a conviction in an obscenity prosecution could not be permitted if the work complained of did not substantially exceed the limits of candor set by contemporary community standards.

> "The community cannot where liberty of speech and press are at issue condemn that which it generally tolerates. This being so, it follows that due process . . . requires a State to allow a litigant

in some manner to introduce proof on this score." 361 U.S. at 171-172.

"However, I would not hold that any particular kind of evidence must be admitted, specifically, that the Constitution requires that oral opinion testimony by experts be heard. There are other ways in which proof can be made, as this very case demonstrates. Appellant attempted to compare the contents of the work with that of other allegedly similar publications which were openly published, sold and purchased, and which received wide general acceptance." 361 U.S. at 172.

The danger of excluding evidence offered by an accused pertinent to the essential issues involved in the determination of "obscenity" is that: "The possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterances will be punished." *Speiser v. Randall*, 357 U.S.513, 526. This Court has specifically held:

"The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause. . . . And, as we have noted above, this right becomes particularly fundamental when the proceeding allegedly results in finding that a particular individual was guilty of a crime." *Jenkins v. McKeithen*, 395 U.S.411, 429.

Deprivation of the right to present evidence bearing upon the issues in a case has been specifically adjudged by the court to be a denial of due process. *Saunders v. Shaw*, 244 U.S.317, 319; *Chin Yow v. United States*, 208 U.S.8, 11-13.

The trial court recognized that there were plainly two categories of evidence which the petitioners could introduce on the issue of obscenity and the corollary issue of *scienter*. It was open to the petitioners to produce expert testimony on issues of contemporary standards and other elements embodied in the concept of obscenity, and it was also open to the petitioners to present evidence of what was going on in the community, what was accepted in the community with respect to the depiction and representation of sex and nudity in the United States. The trial court arbitrarily concluded that it would permit the introduction of evidence by petitioners in only one category, to wit, the category of experts. Clearly, this was fundamental error. It is always open to defendants in a criminal prosecution to introduce into evidence in their behalf all categories of proof which bear on the issues, and an arbitrary exclusion of one kind of evidence is plainly a denial of due process of law, as the decision of this Court and other courts, both state and federal, make evident. See, *Wolcher v. United States*, 200 F.2d 493, 499 (9 Cir. 1952); *Crawford v. United States*, 212 U.S.183. "There is a presumption of harm arising from the existence of an error committed by a trial court against a party complaining, in excluding material evidence on a trial, especially before a jury." 29 S.Ct. at 267.

It is also anomalous that the trial court permitted the experts, at times, to comment upon the comparable material offered by petitioners, but, at the same time, refused to permit the jury to examine the very books, magazines, pictures, etc., commonly accepted in the community upon which the experts were comment-

ing. Thus, even with respect to the experts' testimony, the jury was deprived of the opportunity for learning the bases for the expertise claimed by the experts and the bases for their opinions that the material was not obscene. See, *United States v. Minor*, 459 F.2d 103 (5 Cir. 1972). It should also be recalled that petitioners' experts specifically testified that the comparable materials with respect to which they were testifying, and which the jury were not allowed to see, were openly sold and purchased, and had a reasonable degree of acceptance in the Nation as a whole [JA 166; R.T. 3922-3947].

The exclusion of the comparison evidence, and the consequent undermining of the expert testimony offered by the petitioners was, it is submitted, a palpable denial of a fair hearing and a deprivation of liberty without due process of law. The jury, the sole trier of the facts on the crucial standards of contemporary community standards, as well as the issues of prurient interest, social importance and *scienter*, was denied the right to consider essential evidence on constitutionally relevant issues. The trial court licensed the jury to create their own subjective standards for freedom of expression and to disregard the community toleration which in fact exists in the Nation toward the depiction and representation of sex and nudity.

In a criminal prosecution, the government must prove its case beyond a reasonable doubt, and it is plain that neither court nor prosecution can "prevent the defendant from producing evidence which might create the reasonable doubt". *United States v. Zborowski*, 271 F.2d 661, 668 (2 Cir. 1959). The burden was on the government here to prove beyond a reasonable

doubt that the advertisement substantially exceeded customary limits of candor throughout the Nation in the depiction and representation of sex and nudity, appealed to a prurient interest, and was utterly without social importance. These were the elements which the government had to establish, by evidence, beyond a reasonable doubt, and which the petitioners sought to disprove.

All evidence that is rationally probative is admissible, unless excluded by some rule or principle of law. The trial of a criminal action lies in the evidence, and to refuse admission of competent evidence is to refuse to hear the cause. Moreover, the relevancy or probative value of evidence with respect to any issue is to be sharply distinguished from the weight of the proof. If the evidence is worthy of consideration by the jury, "it is for the jury to give it the appropriate weight in effecting persuasion". 1 Wigmore, Evidence §29 (3d Ed. 1940). As was stated in *Miller v. United States*, 120 F.2d 968, 973 (10 Cir. 1941):

> "The bars which guard the right to a fair trial, such as is guaranteed by our Constitution, include court procedure, rules of evidence and proper instructions to the jury. These bars must not be lowered. To do so is to strike at the very foundation of our system of jurisprudence which has for its ultimate goal the preservation and protection of the liberty and freedom of the individual citizen."

Conclusion.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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STANLEY FLEISHMAN and
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MICHAEL RODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-507

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, LIBRARY SERVICE, INC.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

AMICUS CURIAE BRIEF OF THE AMERICAN LIBRARY ASSOCIATION IN SUPPORT OF APPELLANTS.

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AMICUS CURIAE BRIEF OF THE AMERICAN LIBRARY ASSOCIATION IN SUPPORT OF APPELLANTS.

INTEREST OF THE AMERICAN LIBRARY ASSOCIATION.

The American Library Association, founded in 1876, is a non-profit educational organization with its principal place of business located in Chicago, Illinois. Its membership includes more than 30,000 libraries, librarians, library trustees and members of the general public who are devoted to the development and improvement of library services in the United States.

The Association is the chief spokesman for the modern library movement in North America, and, to a considerable extent, throughout the world. Through its membership and its affiliation

with its constituent state library associations, the American Library Association represents over 29,000 public, university and special libraries, over 90,000 elementary and secondary school libraries and media centers, and over 120,000 librarians.

The American Library Association is an institution unique to American culture and tradition. Through libraries, citizens are provided essentially free access to books, periodicals, magazines, records, microfilms, pamphlets, films and other materials which they require or desire to satisfy their intellectual, emotional, recreational or professional interests.

In providing this service in the free society mandated by our Constitution, it is and has been the responsibility of libraries to make available books and other materials presenting all points of view concerning the problems, issues and attitudes of the times. Libraries and librarians have, therefore, historically resisted efforts to limit their collections to only those materials reflecting attitudes, ideas and literary styles bearing the imprimatur of governmental authority or the approval of the prevailing majority of the populace. As a result, the American library has become, in many respects, the nation's most basic First Amendment institution. Indeed, libraries serve as a primary resource for the intellectual freedom required for the preservation of a free society and a creative culture.

The interest of the American Library Association in the decision of the United States Court of Appeals here under review relates to the constitutional standards governing the *scienter* requirement in criminal obscenity prosecutions.

This issue has been before this Court before, but in each instance the Court has elected to defer its consideration.

Thus, in *Smith* v. *California*, 361 U. S. 147, 154 (1959), the Court stated:

> "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; . . ."

Subsequently, when the issue was raised in *Mishkin* v. *New York*, 383 U. S. 502, 511 (1966), the Court was able to construe Section 1141 of the New York Penal Law so as to make ". . . it unnecessary for us to define today 'what sort of mental element is requisite to a constitutionally permissible prosecution.'"

In *Redrup* v. *New York*, 386 U. S. 767 (1967), the Court originally granted certiorari in order ". . . to consider the standards governing the application of the scienter requirement announced in *Smith* v. *California*, 361 U. S. 147, for obscenity prosecutions," 386 U. S. at 771 (J. Harlan dissenting). After argument, however, the Court concluded that the case should be decided without consideration of such standards, but

> ". . . without prejudice to the questions upon which review was originally granted." 386 U. S. at 770.

Mr. Justice Harlan dissented with Mr. Justice Clark and expressed the view that ". . . the issues for which the cases were taken should be decided." 386 U. S. at 772. Justice Harlan went on to say that he deemed it appropriate to defer an expression of his own views on the issue "until an occasion when the Court is prepared to come to grips with such issues." 386 U. S. at 772.

We submit that this case is such an occasion and that the resolution of this issue can no longer be deferred.

The June 21, 1973 decisions of this Court* involved a general reconsideration of the standards by which obscenity will be defined and judged. Significant as these standards are, the standards of due process which will govern their application are equally, if not more significant. As Mr. Justice Brennan correctly noted in his concurring opinion in *Manual Enterprises* v. *Day*, 370 U. S. 478, 497 (1962):

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* *Miller* v. *California*, 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973); *Kaplan* v. *California*, 413 U. S. 115 (1973) *United States* v. *12 200-Ft. Reels of Super 8MM Film*, 413 U. S. 123 (1973); and *United States* v. *Orito*, 413 U. S. 139 (1973).

> "We risk erosion of First Amendment liberties unless we train our vigilance upon the methods whereby obscenity is condemned no less than upon the standards whereby it is judged."

If, as this Court held in *Miller* v. *California*, 413 U. S. 15, 26 (1973)

> ". . . we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence and other protective features provide . . . "

it is essential that this Court define clearly the nature and scope of such safeguards. Not the least of these safeguards is the "sort of mental element . . . requisite to a constitutionally permissible [obscenity] prosecution." *Smith* v. *California*, *supra*, 361 U. S. at 154.

It is no overstatement to assert that this Court's resolution of this issue will decisively affect the future development and utilization of libraries and library resources in this country. The outcome of this issue can well determine whether libraries will become censors of public morality or will retain their traditional role in support of intellectual freedom.

This brief is submitted in the hope that it will persuade the Court, in the process of its review of the decision below, to define *scienter* in terms which will not require the suppression of constitutionally protected material and the violation of the First Amendment rights of librarians, publishers, authors and the society they serve.

The Association has obtained the written consent of both Appellants and Appellee to the filing of this *amicus curiae* brief.*

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* True copies of the letters evidencing such consent have been lodged in the Clerk's office.

ARGUMENT.

NO PERSON SHOULD BE INDICTED OR CONVICTED OF DISTRIBUTING OBSCENE MATTER UNLESS IT IS FIRST ESTABLISHED THAT SUCH PERSON SPECIFICALLY INTENDED TO DISTRIBUTE MATTER THAT HE KNEW OR BELIEVED TO BE LEGALLY OBSCENE.

It has been generally conceded that this Court in *Smith* v. *California*, 361 U. S. 147 (1959), established that "scienter, as opposed to a statutorily imposed absolute criminal liability, is a necessary and essential element where First Amendment rights are concerned." *U. S.* v. *Hamling*, 481 F. 2d 307, 318 (9th Cir. 1973). The purposes of the *scienter* requirement were defined by this Court in *Mishkin* v. *State of New York*, 383 U. S. 502, 511 (1966) in the following terms:

> "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."

If the purposes of the *scienter* requirement are to minimize self-censorship of constitutionally protected materials and to compensate for ambiguities inherent in the definition of obscenity, then the standards governing the application of the *scienter* requirement for obscenity prosecutions must be formulated to achieve these purposes.

We submit that these purposes cannot be achieved if the *scienter* requirement can be satisfied by a mere showing that the defendant knew the contents of a work. It is not mere "knowledge" but "guilty knowledge" which is the essence of *scienter*. *Morissette* v. *U. S.*, 342 U. S. 246, 252 (1951). And "guilty knowledge" can exist only where the defendant specifical-

ly intended to distribute matter that he knew or believed to be legally obscene.

To hold that mere knowledge of the content of the work satisfies the *scienter* requirement is to create a presumption of knowledge of its obscenity. Yet such a presumption would be completely inconsistent with the "presumption of innocence" upon which this Court has said we may rely in criminal obscenity prosecutions. *Miller* v. *California, supra,* 413 U. S. at 26.

A. If Mere Knowledge of Contents of a Work Constitutes Proof of Scienter, Then the Scienter Requirement Will Not Avoid the Hazard of Self-censorship of Constitutionally Protected Material.

If mere knowledge of the contents of a work ultimately held to be obscene can be the basis of prosecution and conviction, then every person engaged in the distribution of works having sexual content is exposed to criminal prosecution, regardless of the existence of conscious wrongdoing.

This exposure is particularly significant to libraries and librarians as well as to booksellers, authors and publishers.

Every library collection contains many works having sexual content. While it is true that this Court has declined to equate "sex" with "obscenity," *Roth* v. *United States,* 354 U. S. 476, 487 (1957), it is equally true that the difference can be established definitively only by a trier of fact applying the "contemporary community standards" of the "average person" in that community. *Miller* v. *California, supra,* 413 U. S. at 33.

A librarian, in the nature of his profession, cannot be ignorant of the content of the works in his collection. At the same time, nothing in his professional training or experience qualifies him to make the refined legal judgments required to distinguish those works which are "legally obscene" from those that are "constitutionally protected."

Nor can a librarian be compelled to make such a judgment at his peril or he will most certainly engage in the self-censorship which this Court has recognized will impede "the distribution of all books, both obscene and not obscene, . . ." *Smith* v. *California, supra,* 361 U. S. at 154. Given the prospect of criminal prosecution if he misjudges the "community standards," or the presence of "prurient appeal" or the existence of "serious values," the librarian will inevitably "err on the side of caution" in selecting books; perhaps eliminating all works having sexual content. Then too he will restrict the circulation of works in his collection to his own community whose "contemporary standards" are familiar to him. He will, in sum, establish precisely the form of self-censorship which this Court has described as "virulent." *Smith* v. *California, supra,* 361 U. S. at 154. Moreover, the censorship decisions of the librarian will be final and total restraints on the First Amendment rights they affect since they are not subject to any form of judicial review.

Librarians do not desire to become censors of the public morals. On the contrary, librarians philosophically believe that "censorship should be challenged in the maintenance of their responsibility to provide public information and enlightenment."* Yet, it is true that librarians have no economic incen-

* Philosophically, libraries and librarians are dedicated to the public's freedom to read, and to that end they seek to provide access to as broad and varied a spectrum of materials, expressing as many diverse and controversial positions, as their limited budgets permit. The American Library Association's "Library Bill of Rights," therefore, provides, in pertinent part:

"1. As a responsibility of library service, books and other library materials selected should be chosen for values of interest, information and enlightenment of all the people of the community. In no case should library materials be excluded because of the race or nationality or the social, political, or religious views of the authors.

2. Libraries should provide books and other materials presenting all points of view concerning the problems and issues of our times; no library materials should be proscribed or re-

tive which would justify the risk of their personal freedom in order to insure the widest, or, indeed, any distribution of a particular work. For this reason, the purging of libraries of all materials which under any interpretation might be deemed obscene is not merely a possibility but a probability unless this Court requires more than mere "knowledge" of a work's contents as proof of *scienter* in a criminal prosecution.

The effect of such a purge on the First Amendment rights of citizens would not be confined to the community served by any given library. The larger effect would be to destroy libraries as a national intellectual resource. After years of concerted effort, with substantial government support and encouragement, the libraries of the Nation have been tied together through library systems and interlibrary loan programs. As a consequence, the circulation of works in a library collection is not restricted to a single "community" regardless of whether the community is defined as a city, township, county or state.

The development of library collections as a "national intellectual resource" has permitted the maximization of library funds, has permitted the development of broader collections, and, perhaps most important, has given the patron of the smallest library in the most remote part of the country access to the collections of all libraries. In a true sense, the "community" has become an irrelevant concept in identifying access to library collections.

But if access to library collections is not limited to the "community" in which they are located, how then can the library collections be limited to those works which satisfy the "con-

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moved from libraries because of partisan or doctrinal disapproval.

3. Censorship should be challenged by libraries in the maintenance of their responsibility to provide public information and enlightenment.

4. Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas."

temporary standards of that community?" On the other hand, if access to library collections is limited to the "community," how then can such collections continue as a "national" intellectual resource?

If, as this Court has held in *Miller* v. *California, supra,* 413 U. S. at 31-32, there are no "national standards" to "determine whether certain materials are obscene as a matter of fact . . . ," how then may a librarian permit any work in his collection containing sexual matter to be circulated beyond his community? Inter-library loan programs are conducted primarily through the mails. If there are no "national standards," what local standard will be applicable; the standards of the community from which the work is mailed or the standards of the community in which it is received?

These are not hypothetical questions to the librarian. They are real questions, the answers to which will determine the future of library service in this country.

B. If Mere Knowledge of Contents of a Work Constitutes Proof of Scienter, Then the Scienter Requirement Will Not Compensate for the Ambiguities Inherent in the Definition of Obscenity.

When this Court in its June 21, 1973 decisions abandoned the quest for national standards and ruled "obscenity" to be a function of geography, it compounded the ambiguities inherent in the definition of obscenity. When it held that:

> "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Miller* v. *California, supra,* 413 U. S. at 33,

it approved definitions of obscenity which may vary from place to place, from time to time, from jury to jury, and from judge to judge. Moreover, with the recognition that ". . . the mode of distribution may be a significant part of the determination of

the obscenity of the material involved. . . .," *Ginzburg* v. *U. S.*, 383 U. S. 463, 474 n. 15 (1966), the Court has explicitly recognized that non-obscene works may sometimes be obscene and by implication that obscene works in some contexts may be constitutionally protected.

The ambiguities inherent in the definition of obscenity have been repeatedly recognized by members of this Court. Thus, Mr. Justice Black, dissenting in *Ginzburg* stated that "human beings, serving either as judges or jurors, could not be expected to give any sort of decision" concerning prurient interest "which would even remotely promise any kind of uniformity in the enforcement of this law." 383 U. S. at 478-79. Justice Black further stated:

> "My conclusion is that . . . no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity' as that term is confused by the Court today." 383 U. S. at 480-81.

To the same effect is the conclusion reached by Mr. Justice Brennan, dissenting in *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973), where he said

> ". . . The problem is . . . that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so." 413 U. S. at 92.

To compensate adequately for these ambiguities in the definition of obscenity, proof of *scienter* requires nothing less than proof of a specific intent to distribute matter known or believed to be legally obscene.

Without such a requirement, the Court has constituted the distribution of obscenity a crime where liability is absolute and intent irrelevant.

We submit that the evils of obscenity are not such as to warrant this Court in construing the distribution of obscenity as criminal *per se*.

This Court has held that "the separation of legitimate from illegitimate speech calls for . . . sensitive tools . . ." *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958). Absolute criminal liability can hardly be construed as a "sensitive tool."

C. A Requirement of Specific Intent to Disseminate Materials Known or Believed to Be Legally Obscene Would Not Unreasonably Limit the Regulation of Such Materials.

This Court has observed that the mere threat of criminal prosecution may be sufficient to prohibit the circulation of constitutionally protected publications. As the Court stated in *Bantam Books* v. *Sullivan*, 372 U. S. 58, 68 (1962):

> "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around, . . ."

As a consequence, this Court on a number of occasions has undertaken to enjoin such threats by chiefs of police or prosecutors. *Id.* at 67 n. 8.

Recognizing the potential which the threat of criminal prosecution has for the abuse of First Amendment rights, this Court has repeatedly approved those state obscenity statutes which require a judicial determination of the obscenity of the work in question in a civil proceeding prior to any criminal indictments. *Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U. S. at 55; *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 441-444 (1957). As Mr. Justice Burger stated, " . . . such a procedure provides an exhibitor or purveyor of materials the best possible notice prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." *Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U. S. at 55.

Mr. Justice Frankfurter described the advantages of a prior civil proceeding on the issue of obscenity in these terms:

> "Instead of requiring the bookseller to dread that the offer for sale of a book may, without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him for a prompt and carefully circumscribed determination of the issue of obscenity." *Kingsley Books, Inc.* v. *Brown, supra,* 354 U. S. at 442.

We submit that a "requirement of specific intent to disseminate materials known or believed to be legally obscene" would encourage a greater use of the civil proceeding endorsed by this Court to determine obscenity. Such a proceeding would compensate for ambiguities in the definition of obscenity and would eliminate the hazard of self-censorship of constitutionally protected materials.

Librarians desire only to include in their collection works which they may legally acquire. Hence, self-censorship is unnecessary if they can be advised, through a non-criminal proceeding, of the works which are legally obscene and therefore prohibited to them.

Nor would such a requirement unduly hamper the enforcement of obscenity laws. The basic purpose of such laws is to inhibit the distribution of obscene materials without inhibiting the distribution of constitutionally protected works. The civil proceeding, involving where necessary, injunctive relief, has been widely used and has been generally effective. Moreover, and perhaps most significantly, it provides the rigorous procedural safeguards required by this Court. *Blount* v. *Rizzi,* 400 U. S. 410, 417 (1971); *Freedman* v. *Maryland,* 380 U. S. 51, 58-59 (1965); *Kingsley Books* v. *Brown, supra,* 354 U. S. at 443-445.

D. The Court Below Improperly Relied on Rosen v. United States (1896) Because That Decision Was Rendered Before This Court Recognized Scienter As a Constitutional Requirement in Obscenity Prosecutions.

The Court below upheld the trial court's refusal to require the government to prove that "the appellant must have had a specific intent to mail what he knew and believed to be obscene literature." It did so in reliance on this Court's decision in *Rosen v. United States*, 161 U. S. 29 (1896).

We submit that this reliance was misplaced and that the *Rosen* decision, *supra*, does not properly state the law. The assertion in 1896 that:

> "Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious." 161 U. S. at 42,

is simply inconsistent with the realities of modern life and the experience of this Court. If "everyone" *could* "take notice of what . . . must be deemed obscene, lewd, and lascivious," the decisions of June 21, 1973 and all of this Court's previous attempts to define "what everyone should know" have been unnecessary.

Moreover, this Court specifically stated in *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 492 (1962) that

> ". . . Congress has required *scienter* in respect of one indicted for mailing material proscribed by the statute."

The statute involved was 18 U. S. C. Section 1461, the same statute under which Appellants were indicted and convicted. Section 1461 is substantially the same as the statute which was construed in *Rosen, supra.*

The *Rosen* decision did not recognize the requirement of *scienter*. On the contrary, the Court specifically stated that:

". . . The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd and lascivious was recognized as the test for determining whether the statute has been violated . . ." 161 U. S. at 41-42.

While we would agree that the belief of the accused is irrelevant to the issue of whether or not matter is legally obscene, we cannot agree that such belief is not a reasonable and proper test to determine whether the accused has violated the statute. If *scienter* means anything, it means something significantly more than mere knowledge of the contents of a work. *Manual Enterprises, Inc.* v. *Day, supra,* 370 U. S. at 494-495.

CONCLUSION.

We submit that *scienter*, if properly defined, is the "sensitive tool" by which this Court can separate "legitimate from illegitimate speech," *Speiser* v. *Randall,* 357 U. S. 513, 525 (1958), can avoid the hazards of self-censorship and compensate for the ambiguities in the definition of obscenity, *Mishkin* v. *State of New York,* 383 U. S. 502, 511 (1966).

If this Court holds that *scienter* requires proof of a specific intent to distribute matter known or believed to be legally obscene, prosecutors will be greatly encouraged to establish the "obscenity" of a work before instituting criminal proceedings. As a consequence, librarians, authors, publishers, and booksellers will not be compelled to engage in self-censorship. They will know the works prohibited to them. This in turn will eliminate, or at least minimize, the risk that the ambiguity inherent in the definition of obscenity will cause a person to "be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss,* 347 U. S. 612, 617 (1954).

Such a *scienter* requirement would further discourage the use of criminal prosecution as a means whereby public officials can coerce the suppression of constitutionally protected materials without the judicial review which this Court has mandated. *Blount* v. *Rizzi*, 400 U. S. 410, 417 (1971); *Freedman* v. *Maryland*, 380 U. S. 51, 58-59 (1965).

At the same time, the objectives of the obscenity laws would be achieved, although not perhaps through the eye-catching headlines which attend criminal prosecutions. Obscene works could still be identified, distribution could be enjoined or controlled, and persons persisting in distributing works established as obscene could be prosecuted vigorously and with reduced chance of error.*

Librarians, booksellers, authors and publishers could engage in their profession or business without keeping "one eye on prosecutors or juries," *U. S.* v. *Roth*, 237 F. 2d 796, 825 (2d Cir. 1956), and libraries could remain a national intellectual resource free to participate in library systems and interlibrary loan programs without peril.

In sum, a *scienter* requirement which requires "guilty knowledge" for prosecution and which protects "those who were not blameworthy in mind from conviction," *Morissette* v. *U. S.*, *supra*, 342 U. S. at 252, would resolve or make irrelevant most of the issues which have confounded this Court for so many years in its consideration of "obscenity" and the First Amendment.

Amicus respectfully submits that the Court should reverse the decision of the Court of Appeals for the Ninth Circuit and, in

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* Furthermore, nothing is to prevent the state from adopting reasonable "time, place and manner" regulations which may be deemed necessary. *Cox* v. *Louisiana*, 379 U. S. 536, 554-555 (1965).

so doing, establish specific intent as the indispensable element of the *scienter* constitutionally required for a permissible obscenity prosecution.

Respectfully submitted,

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FILED
MAR 18 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-507

WILLAM L. HAMLING, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, *AMICI CURIAE*

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IN THE

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OCTOBER TERM, 1973

No. 73-507

WILLAM L. HAMLING, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, *AMICI CURIAE*

Interest of *Amici Curiae**

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members engaged solely in the defense of those principles embodied in the Bill of Rights. The American Civil Liberties Union of Southern California is an affiliate of the American Civil Liberties Union and functions within Southern California where this case arose. During its fifty-four year existence, the ACLU has primarily been concerned with protecting the First Amendment guarantees of freedom of speech and press. Our original concern was with direct governmental efforts to restrict political expression. But it has been our experi-

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*Letters of consent from counsel for the petitioners and the United States have been filed with the Clerk of the Court.

ence that when any form of speech or writing, such as "obscenity", is declared to be beyond the bounds of constitutional protection, such exceptions are employed to suppress political expression. Similarly, the exclusion of any category of expression from general First Amendment protection erodes the safeguards for speech which is protected.

Because of these concerns, we have participated in many of this Court's decisions dealing with obscenity issues. We filed amicus curiae briefs in connection with three of the cases decided by the Court on June 21, 1973. In those briefs we suggested that neither the doctrinal nor the empirical case for excluding this particular category of expression from constitutional protection had ever been made. We still hold to that view.

But even assuming the soundness of the Court's rulings that material categorized as obscene may be systematically prohibited, controlled and regulated, this case presents important issues concerning the propriety of the exercise of federal power to accomplish such control, the method by which that power is exercised, and the due process violations inherent in applying standards enunciated in 1973 to punish conduct engaged in prior to that time.

The specific issues in this case involve the proper application of the federal statute prohibiting the mailing of obscene material in general, and particularly in light of last Term's rulings. The purpose of this brief is to suggest to the Court the larger context in which these issues must be decided.

Summary of Argument

This Court's decisions in *Miller* v. *California*, 413 U.S. 15 (1973) and *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), reaffirming the doctrine that obscenity may be systematically proscribed by the state, rest upon analytic premises which have been eroded and an inadequate demonstration of social harm. The proper way out of the "intractable obscenity problem" was charted in *Stanley* v. *Georgia*, 394 U.S. 557 (1969), that is, the application of a traditional First Amendment approach to obscenity, focusing on the context, not the content, of the communication and assessing the governmental interests involved in the particular situation.

Notwithstanding the Court's assurances, last Term's obscenity decisions will not be limited to the prohibition of hard-core pornography, especially since one of the Court's avowed purposes was to facilitate prosecution of obscene material. The power to suppress materials with a sexual content has historically been used as a pretext to censor publications because of their political or social commentary. In this century alone, the existence of sexual content has been used as the predicate for banning the works of authors such as James Joyce, Theodore Dreiser, Erskine Caldwell, Edmund Wilson, Sinclair Lewis and Ernest Hemingway. More recently, dissident expression of opinion has been punished because it was assertedly obscene. See, *e.g.*, *Kois* v. *Wisconsin*, 408 U.S. 229 (1972). Events since last June have done nothing to dispute the prediction that the Court's rulings will fuel the forces of repression and censorship.

Even if obscenity can continue to be banned systematically, the case for the exercise of federal power in this area has never adequately been made, and the argument that federal interests in this area are attenuated, see *Roth* v. *United States*, 354 U.S. 476, 504-05 (1957) (dissenting opinion of Justice Harlan), has not been answered. The federal postal power cannot be used as the predicate for censorship of obscenity. See, *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965); *Hiett* v. *United States*, 415 F.2d 664 (5th Cir. 1969). And the federal government has no identifiable substantive power over the kinds of interests which in *Paris Adult Theatre I* were held to justify comprehensive state regulation.

Finally, even if federal power over obscenity is recognized, such power should not be exercised through a statute as vague as Section 1461. Vague laws regulating expression violate First Amendment interests and the due process "principle of legality." *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); *Levy* v. *Parker*, 478 F.2d 772 (3rd Cir. 1973); *prob. juris. noted*, 42 U.S. Law Week 3155 (Sept. 25, 1973). Though *Roth* upheld this statute against a vagueness challenge, the *Miller* decision requires the kind of specificity which this statute lacks. And even if it can be "authoritatively construed" to embody the *Miller* requirements, such construction should not be retroactively applied to these petitioners.

I.

The continued exclusion of obscenity from the protection of the First Amendment is unjustified.

The path of this Court's obscenity jurisprudence, from *Roth* v. *United States*, 354 U.S. 476 (1957) to *Miller* v. *California*, 413 U.S. 15 (1973) and *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), has been traced many times and needs little elaboration. In *Roth*, addressing the question for the first time, the Court held that "obscenity is not within the area of constitutionally protected speech or press." 354 U.S. at 485. The bases for the ruling were dicta in earlier cases, some scanty evidence that obscenity had been banned in colonial times, and the almost universal prohibition of obscenity in contemporary times. The analytical theory of the decision was that certain categories of utterances "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." 354 U.S. at 485 (quoting from *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942)). Thus, obscenity joined other kinds of utterances—most notably "fighting words" and "libel"—as somehow beyond the constitutional pale. As a consequence of applying this "two-level" theory of the First Amendment, the *Roth* Court did not have to undertake the task of carefully analyzing the precise societal interests advanced by the proscription of obscenity. Indeed, "[c]ommentators have suggested that the two-level theory was used in *Roth* because it was unlikely that the Court would have been able to marshal evidence that the consequences of obscenity, in terms of antisocial con-

duct or more general injury to society, were so imminent or significant as to support proscription under any previous formula used to justify regulation of protected speech." *The Supreme Court, 1972 Term,* 87 HARV. L. REV. 1, 162-63, n. 19.

In the years since *Roth,* the doctrinal underpinnings of the decision have been seriously eroded. In *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), the Court rejected the doctrine that once an utterance can be categorized as "libel", it is then stripped of all First Amendment protection. See also, *Gooding* v. *Wilson,* 405 U.S. 518 (1972) (fighting words doctrine). And, in general, this Court has disapproved efforts to exclude categories of speech from the protection of the First Amendment by attaching labels to the kind of expression involved. See, *N.A.A.C.P.* v. *Button,* 371 U.S. 415 (1963); *cf. Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973).

Similarly, in the years between *Roth* and *Miller,* the Court's efforts were devoted not to an examination of the interests supporting obscenity laws, but to elaborating and applying the constitutional definition of obscenity and spelling out the procedural safeguards which had to be employed in the course of determining on which side of the constitutional line the particular magazine, book or film would be placed. And, of course, the consequence of the two-level approach to obscenity was that each determination in each case presented the constitutional issue whether the categorization, and thereby the denial of constitutional protection, was valid. For although on one side of the line there was prohibitable obscenity, on the other side was protected expression, buttressed by all the accepted First

Amendment values designed to maximize the flow and scope of information and discussion. See, *Thornhill* v. *Alabama,* 310 U.S. 88, 102 (1940); *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945). Thus, the "intractable obscenity problem" persisted, and the variety of positions taken by Justices of this court proliferated. See, *Interstate Circuit, Ltd.* v. *Dallas,* 390 U.S. 676, 704-08 (1968) (Harlan, J. dissenting).

For a while it appeared that a majority of the Court would break out of the pattern by moving away from the focus on content toward a traditional First Amendment inquiry into the context and manner in which the material is presented. Such an analysis would assess whether the communication of the material—even though obscene—could be found to trench upon presumably valid state interests, such as prohibiting the pandering of obscene materials, protecting minors, or guarding the rights of adults who would not wish exposure to such communications. See, *Redrup* v. *New York,* 386 U.S. 767 (1967). Such an approach contained two important benefits. First, it could bring familiar, traditional First Amendment analysis to the obscenity area; second, it would ease the pressures on this and lower courts by reducing the number of cases when the issue of obscenity *vel non* would have to be addressed.

The apex of this approach was *Stanley* v. *Georgia,* 394 U.S. 557 (1969), where the Court held that a statute punishing "mere private possession of obscene matter violates the First Amendment." *Id.* at 559. While the setting of *Stanley* was the privacy of the home, the *ratio decidendi* of the decision was anchored in the interests protected by freedom of expression. Equally important, in rejecting Georgia's arguments that it possessed constitutional power

to ban the mere possession of obscene materials, the Court explicitly overruled some of the primary arguments traditionally offered to sustain obscenity laws. To the argument that there is state power "to protect the individual's mind from the effects of obscenity," the Court responded that such sway over the "moral content of a person's thoughts" is "wholly inconsistent with the philosophy of the First Amendment." 394 U.S. at 565-566. As to the claim that "exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence," the Court found "little empirical basis," *id.* at 566, for the assertion and no legal justification for suppressing ideas because they may lead to harmful conduct. Finally, a ban on private possession could not be supported as an aid to enforcement of prohibitions against distribution.

By holding that obscene material was nevertheless entitled to some constitutional protection, and in rejecting certain of the primary rationales for obscenity statutes, the *Stanley* decision contained the potential for redirecting the focus of this Court's doctrine in this area. And, indeed, many lower courts read *Stanley* as having written "a new chapter" in obscenity law, one requiring attention to the government interests implicated in the particular prohibition. See, e.g., *United States* v. *Dellapia*, 433 F.2d 1252 (2d Cir. 1970). In *Dellapia*, the federal statute involved here, 18 U.S.C. §1461, was utilized to prosecute the private mailing of obscene films. Finding that the defendants' conduct infringed no interest which justified governmental regulation, the Second Circuit, in an opinion by Chief Judge Irving Kaufman, reversed the conviction: "It would be anomalous to prevent consenting adults from freely passing among themselves obscene material which *Stanley* tells

us each of them was entitled to possess and view or read." *Id.* at 1258. Similarly, in *United States* v. *Various Articles of "Obscene" Merchandise,* 315 F. Supp. 191 (S.D.N.Y. 1970) (three-judge court), *prob. juris. noted,* 402 U.S. 971, *app. dismissed,* per Rule 60, 403 U.S. 942 (1971), invalidating the federal ban on importing obscene materials as applied to a person importing single items for his own use, Circuit Judge Moore concluded that "orthodox First Amendment considerations are once again of paramount importance, *Roth* notwithstanding, even where the publications in issue are concededly obscene." *Id.* at 195. See also, *Stein* v. *Batchelor,* 300 F. Supp. 602 (N.D. Tex. 1969) (three-judge court), *vacated on other grounds, sub nom., Dyson* v. *Stein,* 401 U.S. 200 (1971); *Karalexis* v. *Byrne,* 306 F. Supp. 1363 (D. Mass. 1969), *vacated on other grounds,* 401 U.S. 216 (1971).

But these stirrings of a new, sound approach to the problem, one which would recognize valid governmental interests while accommodating traditional First Amendment concerns, were short-lived. In 1971, with a change in the composition of the Court, the reach of *Stanley* began to be limited. See, *United States* v. *Reidel,* 402 U.S. 351 (1971); *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363 (1971). And with *Miller* and *Paris Adult Theatre I,* a majority of the court delivered the *coup de grace* to whatever potential remained to utilize *Stanley* as a sound route away from the "intractable obscenity problem." With these two cases the Court has, with some adjustments and troubling implications, retreated back to the regime of *Roth.*

The obvious question is why? Why, when the doctrinal premise of *Roth*—that certain categories of expression are really not expression—is far weaker than it was 15 years

ago, has the Court reaffirmed the two-level theory of obscenity. And why, in the absence of any intervening, systematic showing that exposure to obscenity is socially harmful, has harm once again simply been assumed.

In *Paris Adult Theatre I*, the majority attempted to answer these questions by identifying the state interests which obscenity regulation fosters. Relying on a minority report of the Commission on Obscenity and Pornography, and on commentators who generally support strong social controls, the majority found "at least an arguable correlation between obscene material and crime," 413 U.S. at 58, or at least that a legislature "could quite reasonably determine that such a connection does or might exist." *Id.* at 61. Not only did *Stanley* conclude that such connections had not been shown, but, in general, where First Amendment rights are potentially involved, the Court has required a much more substantial demonstration that the prohibition rests on firm, indeed compelling, legislative premises—not merely the possibility of a speculative connection between the speech to be prohibited and the social danger to be averted. See, *Dennis* v. *United States*, 341 U.S. 494, 505-08 (1951); *Communist Party* v. *S.A.C.B.*, 367 U.S. 1, 90-93 (1961). Similarly, there has been no persuasive showing that the concern with protecting children or non-consenting adults could not be met in ways short of continued, total prohibition of obscenity outside of the home. Finally, and most ominously, the Court indicated that obscenity legislation could validly be premised on concern for the quality and tone of life, particularly in urban areas, as part of the general governmental power to protect "the social interest in order and morality." 413 U.S. at 61. One would have thought that morality is too gossamer, let alone danger-

ous a basis for regulation in the First Amendment area. See, *Kingsley International Pictures Corp.* v. *Regents*, 360 U.S. 684 (1959). Many individuals in our society ardently believe, whether rightly or wrongly, that the mere awareness of the general availability of abortion demeans the quality and tone of life; yet such beliefs—embodied in legislation—were held insufficient to justify the systematic prohibition of abortions for those women who wish to have them. *Roe* v. *Wade*, 410 U.S. 113 (1973). Why should the availability of obscene materials and books to those who wish exposure to them be treated any differently? If a legislature's determination that certain forms or modes of expression adversely affect the quality or tone of life can serve as a valid predicate for regulation or prohibition of that expression, it is difficult to see how the line can be drawn at hard-core pornography.

II.

The authority to prohibit obscene materials will be used to suppress protected expression.

In the decisions last Term, the Court attempted to assure its critics that the re-affirmation of systematic state power to proscribe obscene materials would not result in a fresh wave of repression of ideas worthy of expression. *Miller* v. *California, supra*, 413 U.S. at 34-36. Repression would be limited to the area of hard-core pornography. Enforcement of such limits would be insured by confining "the permissible scope of such regulation to works which depict or describe sexual conduct," and by requiring that such conduct "be specifically defined by the applicable state law, as written or authoritatively construed." *Id.* at 24. But

specifying the kind of sexual conduct which will trigger suppression of a book or movie is no guarantee that only hard-core pornography will be proscribed. See, *United States* v. *35 MM Film Entitled "Language of Love,"* 432 F.2d 705, 715-16 (2d Cir. 1970).

More importantly, the net effect of the Court's rulings was to make censorship easier, not harder, than it was before. Indeed, the explicit purpose of replacing the "utterly without redeeming social value" test with the more relaxed showing that a work "lacks serious literary, artistic, political, or scientific value" was to facilitate the task of the prosecutor. Similarly, the rejection of a national standard of offensiveness and prurience in favor of hypothetical state (or perhaps even local, see *Price* v. *Commonwealth*, —— Va. ——, 14 Cr. L. Rep. 2379 (Va. Sup. Ct., Jan. 14, 1974)) standards of taste and decency will further expedite prosecution by allowing a kind of "local option" on the First Amendment. Nor need the authorities attempt to produce expert testimony that the material in question is obscene. *Paris Adult Theatre I* v. *Slaton, supra*, 413 U.S. at 56.

Between the lines of these rulings law enforcement officials can read the clear signal: a majority of this Court has found its way out of the intractable obscenity problem by retreating from the concept that each obscenity case is at the same time a First Amendment case. Instead, deference will be paid to local standards and local fact-finding, with the implication that the conclusions reached by state tribunals will be insulated from federal review, and the conclusions of federal tribunals will not necessarily prompt this Court's review.

That this new approach has prompted "a great deal of hand wringing by concerned libertarians," *People* v. *Heller*, —— N.Y.2d —— (1973) is perfectly understandable. Civil libertarians are always concerned about the ease with which any grant of censorship powers degenerates into a general warrant for repression of ideas. The majority express confidence that its reaffirmation of the power to suppress hard core pornography will be confined to such materials. But, historically, the pressures toward general censorship of disagreeable and dissident expression are hydraulic even under the best of circumstances. The power to ban the obscene has inevitably exceeded the purposes for which the power has been granted.

Let us again remind the Court of the works which have been banned on the basis of *sexual content*. This history has been told in the pages of judicial decisions as well as in special studies on the problem. See Haight, BANNED BOOKS (3d Edit. R. R. Bowker Co. 1970); T. Emerson, *The System of Freedom of Expression* (1970), pp. 468-70. The list of authors whose works have been censored reads like a "Who's Who" of classic literature:

—James Joyce (*United States* v. *One Book Called "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934));

—Theodore Dreiser (*Commonwealth* v. *Friede*, 271 Mass. 318, 171 N.E. 472 (1930)) ("An American Tragedy");

—Erskine Caldwell (*Attorney General* v. *Book Named "God's Little Acre"*, 326 Mass. 281, 93 N.E.2d 819 (1950));

—Edmund Wilson (*Doubleday and Co.* v. *New York*, 335 U.S. 848 (1948)) ("Memoirs of Hecate County");

—Voltaire ("Candide", see *Banned Books, supra,* p. 33);

—Walt Whitman ("Leaves of Grass", see *Banned Books,* p. 53);

—Sinclair Lewis ("Elmer Gantry", see *Banned Books,* p. 80);

—Henry Miller (*Besig* v. *United States,* 208 F.2d 142 (9th Cir. 1953)) ("Tropic of Cancer", "Tropic of Capricorn");

—Ernest Hemingway ("A Farewell to Arms", "The Sun Also Rises", "To Have and Have Not", "For Whom the Bell Tolls", see *Banned Books,* pp. 90-91);

—Erich Maria Remarque ("All Quiet on the Western Front", see *Banned Books,* p. 92);

—John Steinbeck ("Grapes of Wrath", see *Banned Books,* p. 93).

As this list indicates, many of these works were banned because of their political content, not their sexual explicitness; the presence of the latter simply served as the formal justification for the suppression of the former. That is how the censor works. His agenda usually contain material whose sexual content is incidental or ancillary to the primary purpose of expressing views which are dissident, satirical, irreverent, sacrilegious or profane. The presence of sexual content is used as the pretext for suppressing works because of the ideas they contain, ideas completely divorced from the pornographic.

Indeed this Court is familiar with recent examples of this phenomenon.

In *Kois* v. *Wisconsin*, 408 U.S. 229 (1972) (per curiam), the petitioner, the publisher of an underground newspaper called "Kaleidoscope," was convicted under a state obscenity statute and sentenced to two years in prison. The crimes involved were publishing two photographs of a nude couple embracing, and publishing a "Sex Poem." This Court granted certiorari, determined that the items were not obscene, and reversed the convictions. How would that case have been decided under the new standards? Equally important, will this Court be able to review all such convictions to assure that its recent decisions are applied only to hard-core pornography?

In *Dyson* v. *Stein, supra,* police raids were directed at the publisher of Dallas Notes, another underground newspaper, effectively putting it out of business. The predicate for the raids was a search warrant authorizing the seizure of "obscene articles and materials." Will the Court's obscenity rulings deter such practices or encourage them?

In *Papish* v. *University of Missouri Board of Curators*, 410 U.S. 667 (1973), the petitioner had been expelled from a state university for distributing a newspaper containing "forms of indecent speech," particularly a cartoon depicting a rape of the Statue of Liberty by police, and a headline containing a well-known "twelve-letter" word. The District Court held that the two items were obscene; the Eighth Circuit affirmed on the theory that the petitioner could be expelled regardless of whether the items were obscene. A majority of this Court held that the cartoon and headline could not be found obscene. There were two dissents, both premised on the concept that university power

to suppress "obscene and infantile" expression was greater than state power to prosecute for distribution of the same material. If the petitioner distributed the identical newspaper today, on or off the campus, is it clear that punishment or prosecution could not validly go forward under the Court's recent rulings?[1]

In numerous cities, distributors of underground newspapers containing political criticism and satire have been subjected to arrests and harassment, usually because the publications contained some sexual material claimed by police to be obscene. See, e.g., *Washington Free Community* v. *State's Attorney*, 300 F. Supp. 487 (D. Md. 1969); *Great Speckled Bird of Atlanta* v. *Stynchcombe*, 298 F. Supp. 1291 (N.D. Ga. 1970); *United States* v. *Head*, 317 F. Supp. 1138 (E.D. La. 1970); *Henley* v. *Wise*, 303 F. Supp. 62 (N.D. Ind. 1969); *Kois* v. *Breier*, 312 F. Supp. 19 (E.D. Wis. 1970). In various cities, the producers of "Hair," an

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[1] Indeed, on many campuses school officials have consistently attempted to invoke obscenity rules to punish faculty or students for distributing or seeking access to materials which in no legitimate way could be characterized as "obscene." For example, in New York, school officials removed from a school library a book describing ghetto life, entitled "Down These Mean Streets," in part because of complaints that it contained "obscenities and explicit sexual interludes." *Pres. Council, Dist. 25* v. *Community School Board, District 25*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972). In Ohio, one school district banned "Catch 22" by Joseph Heller and "Cat's Cradle" by Kurt Vonnegut, Jr.; another razored out pages from the "Spoon River Anthology." In Alabama, a teacher was dismissed for assigning another Vonnegut story, "Welcome to the Monkey House," in part because it advocated "free sex." Litigation was necessary to declare that the work was not obscene and secure the teacher's reinstatement. *Parducci* v. *Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970). Such examples are merely illustrative. In all of them, the existence of any sexual content at all provided the major premise for the censor's actions.

award-winning musical that successfully ran on Broadway for years, have had to go to court to secure the right to perform their satirical show because it contained brief episodes of nudity. See *Southeastern Promotions, Ltd.* v. *City of Atlanta,* 334 F. Supp. 634 (N.D. Ga. 1971) (and cases cited therein); *Southeastern Promotions, Ltd.* v. *Conrad,* 486 F.2d 894 (6th Cir. 1973), *cert. granted,* 42 U.S. Law Week 3388 (Jan. 8, 1974).

And so it goes. The common element in all these cases is the use of obscenity statutes as a vehicle for attempts to suppress political or social commentary. This process occurred during the regime of *Redrup* v. *New York,* 386 U.S. 767 (1967), when very little was thought validly to come within the reach of obscenity laws. The effect of this Court's recent rulings—particularly the reference to local standards of taste in such matters—can only be to accelerate this process.

Events since June 21, 1973 have done nothing to dispel these fears. To the contrary, in the months following this Court's rulings a wave of censorship has swept across this Nation, encompassing material admittedly with a sexual content but which in no way could be characterized as hard-core pornography.[2] In its wake, vendors of "girlie" maga-

[2] The publishers of Playboy Magazine have supplied to *amici curiae* incident reports submitted by retailers and wholesalers of Playboy, Oui, Penthouse and similar publications. Those reports demonstrate two distinct patterns resulting from the Court's rulings: (1) harassment by public officials and (2) self-censorship by distributors.

Thus, for example, in Ashland, Ohio, the owners of a candy store were arrested and ten boxes of magazines, including Playboy, were seized. In Greenville, Mississippi, Playboy and similar magazines were confiscated from a supermarket and the distributors were threatened with a fine. In Mason, Georgia, magazines similar to

zines have been harassed, school teachers have been punished for assigning the works of writers such as Kurt Vonnegut, Jr. (whose books were burned in North Dakota), the distributors of critically acclaimed movies have been threatened with prosecution, see, *United Artists Corp.* v. *Proskin*, 363 F. Supp. 406 (N.D. N.Y. 1973) (three-judge court) ("Last Tango in Paris").[3] Worst of all, the Court's decisions have had a demonstrable deterrent effect on the creative community responsible for our contemporary books and movies.

Despite the assurances given last Term, the effect of the Court's decisions has been to exacerbate the problems of censorship and fuel the forces of repression which have always lurked beneath the surface of American life. The certain way to reverse the trend is to reconsider the premises of those decisions and return to the path charted in *Stanley*.

Playboy were confiscated and court proceedings were commenced. In Shreveport and Jackson, Mississippi, public officials ordered such magazines off the newsstands. Similar orders were given to newsstand owners in Hopeville, Virginia, Steubenville, Ohio, and Atlanta, Georgia.

Far worse than these episodes of official harassment are instances of self-censorship where distributors have unilaterally determined to discontinue handling such magazines. For example, in Southern California, a major supermarket chain has stopped selling Playboy. The same thing has occurred in Boise, Idaho. A major drug store chain in Baltimore, Maryland has taken similar action. And in Cleveland, Ohio, the operators of a chain of drug stores have asked to see advance copies of each issue so that they can decide whether to sell Playboy in their various stores.

[3] All these various episodes are detailed in the *amicus curiae* brief of the Association of American Publishers in *Jenkins* v. *Georgia*, O.T. 1973, No. 73-557, at pp. 10-17.

III.

The federal postal power should not be utilized as the predicate for censorship of obscenity.

Up to now, the discussion has focused on whether this Court should continue to allow systematic government censorship of obscenity and what the consequences of such censorship have been and will continue to be. But this case has a special dimension, for it involves not the States' claimed power to regulate the quality and tone of life, but the federal government's attenuated power to deal with obscenity by use of its authority over the mails.

In *Roth* v. *United States, supra,* the majority opinion dealt with this issue perfunctorily, reasoning that since ". . . obscenity is not expression protected by the First Amendment. . . . the federal obscenity statute punishing the use of the mails for obscene material is a proper exercise of the postal power delegated to Congress by Art. I, §8, cl. 7." 354 U.S. at 492-93 (footnotes omitted). In reaching this conclusion, reliance was placed on the "hoary dogma . . . that the use of the mails is a privilege on which the Government may impose such conditions as it chooses," a doctrine which "has long since evaporated." 354 U.S. at 504, n. 5 (dissenting opinion of Justice Harlan). As Justice Holmes said in his famous dissent: "[t]he United States may give up the post office when it sees fit, but while it carries it on the use of the mails is as much a part of free speech as the right to use our tongues." *United States ex rel. Milwaukee Social Democratic Pub. Co.* v. *Burleson,* 255 U.S. 407, 437 (1921). And cases since *Roth* have made

it clear that the Congress cannot use its controls over an otherwise neutral conduit to create or enhance the federal government's substantive censorship powers. See, *Lamont* v. *Postmaster General*, 381 U.S. 301, 305 (1965); *Hiett* v. *United States*, 415 F.2d 664 (5th Cir. 1969); cf. *United States* v. *18 Packages of Magazines*, 238 F. Supp. 846, 848 (N.D. Cal. 1964).

The existence of any substantive federal power to regulate obscenity is similarly questionable. The theory was developed by Justice Harlan in *Roth*:

> But in dealing with obscenity we are faced with the converse situation, for the interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric.
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> Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do. 354 U.S. at 504-05.

Since then, in none of the cases involving Section 1461 has this Court responded to Justice Harlan's argument. See, *Ginzburg* v. *United States*, 383 U.S. 463 (1966); *United States* v. *Reidel*, 402 U.S. 351 (1971); cf. *United States* v.

Orito, 413 U.S. 139 (1973) (involving Section 1462).[4] For example, the analogous power to control interstate commerce, upheld in *Orito* as the basis for regulating shipment of obscene materials across state lines, has its limitations. See, *e.g.*, *United States* v. *Bass*, 404 U.S. 336 (1971); see also, *United States* v. *Maze*, —— U.S. ——, 42 U.S. Law Week 4113 (Jan. 8, 1974) (mail fraud). Presumably an *intra*state shipment of obscene materials by private carriage could not be reached by 18 U.S.C. Section 1462. By the same reasoning, what possible federal interests—other than the secondary ones identified by Justice Harlan—would justify penalizing the intrastate mailing of the same material?

Lower federal courts have also balked at the concept of employing the postal power as the basis for plenary federal control over obscene materials. For example, in *United States* v. *Dellapia, supra*, the Second Circuit construed the mail statute's "broad prohibition as subject to an underlying requirement that the mailing trespass upon a valid governmental which constitutionally justifies invasion of a private consensual relationship . . . ." 433 F.2d at 1260. And even the Government, perhaps in recognition of the attenuated federal interest in regulating obscenity, at one point announced a policy of not enforcing the statute to prosecute the private mailing of obscene correspondence. See *Redmond* v. *United States*, 384 U.S. 264 (1966) (per curiam); *Cox* v. *United States*, 370 F.2d 563 (9th Cir. 1967); cf. *United States* v. *Watson*, 293 F. Supp. 694 (W.D. Mo. 1968).

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[4] Justice Harlan did concede "a limited [federal] interest" in excluding hard-core pornography from the mails. *Memoirs* v. *Massachusetts*, 383 U.S. 413, 457 (1966) (dissenting opinion). But even he was only able to identify the interest in terms of the possible thwarting of state regulation if the mails were used to distribute such materials. *Id.* at 457, n.2.

Finally, the assertion of federal power to censor obscenity involves a very real doctrinal and practical dilemma.

On the one hand, it appears settled that in enforcing Section 1461's ban on mailing obscene materials, a national standard of decency must be employed to assess the offensiveness of the challenged subject-matter:

> There must first be decided the relevant "community" in terms of whose standards of decency the issue must be judged. We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency. *Manual Enterprises* v. *Day*, 370 U.S. 478, 488 (1962).

As the First Circuit recently pointed out, requiring anything less than national standards under Section 1461 would allow intolerable leeway for forum-shopping and selective prosecution:

> Since the statute proscribes the deposit for mailing, conveying in the mails, and delivery of obscene materials, were a state standard to govern the level of tolerance, guilt or innocence could easily turn on the choice to prosecute in the state of mailing, the state of delivery, or a state through which the material passed. This would open the possibility of senders of identical materials from the same state to be found guilty or not, depending on the course of transit or state of delivery of their materials. The vice of selective prosecution would also be present, as well as the anomalous situation of having prosecution under a national law depend

upon the laws of the least permissive states. *United States* v. *Palladino*, —— F.2d ——, 14 Cr. L. Rep. 2354, 2355 (1st Cir. 1974).

On the other hand, *Miller* v. *California* held not only that "national" standards were not required in State proceedings, but that such standards were "abstract", "hypothetical", "unascertainable." Thus, while national standards should be applied under the federal statutes to avoid all the constitutional problems identified in *Manual Enterprises* and *Palladino*, the majority of this Court has indicated that such standards are too speculative to be applied in State proceedings. The "unascertainable" nature of national standards would render any prosecution under them a violation of due process requirements. See *Winters* v. *New York*, 333 U.S. 507 (1948); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926). And the utilization of less than a national standard, under this federal statute, would have an enormously inhibiting effect on those who use the mails to transmit books, magazines, or films with a sexual content. Editors will spend more time worrying about postal routes than about literary quality.

Since the primary interests purportedly advanced by the regulation of obscenity are state, not federal, see *Paris Adult Theatre I* v. *Slaton*, *supra*, the existence of such a constitutional dilemma is particularly intolerable.

IV.

Section 1461 is prohibitively vague, and its continued enforcement violates several fundamental constitutional principles.

Even assuming that hard-core pornography can continue to be prohibited systematically through the use of the federal postal power, the use of Section 1461 to accomplish such prohibition and its application in this case offend a number of constitutional safeguards.

Section 1461 proscribes the mailing of every "obscene, lewd, lascivious, indecent, filthy or vile" matter. As written, it embodies the three major evils of vague enactments which this Court has identified:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens

> to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned* v. *City of Rockford,* 408 U.S. 104, 108-09 (1972) (footnotes omitted).

See also, *Winters* v. *New York,* 333 U.S. 507 (1948); *Burstyn* v. *Wilson,* 343 U.S. 495 (1952); *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U.S. 684 (1959). From a First Amendment perspective, vague laws are condemned because they have the effect of deterring protected expression. Equally important, in a due process sense, vague laws violate the "principle of legality" common to all civilized nations. *Levy* v. *Parker,* 478 F.2d 772, 791 (3rd Cir. 1973), *prob. juris. noted,* 42 U.S. Law Week 3155 (Sept. 25, 1973). As Justice White has observed,

> . . . our civilization has assumed that the threat of penal sanctions had something more than a "speculative" effect on a person's conduct. This Court has long acted on that assumption in demanding that criminal laws be plainly and explicitly worded so that people will know what they mean and be in a position to conform their conduct to the mandates of law. *Linda R.S.* v. *Richard D.,* —— U.S. ——, 35 L.Ed.2d 536, 543 (1973) (dissenting opinion).

The prohibitions in Section 1461 are not "plainly and explicitly worded so that people will know what they mean," and the contrary claim has never seriously been made. Indeed, in *Roth,* where the vagueness challenge was rejected in passing, the majority admitted that the terms of the statute were "not precise." 354 U.S. at 491. Instead, the Court held that the statutory terms, "applied according to the proper standard for judging obscenity, already

discussed, give adequate warning of the conduct proscribed. . . ." *Ibid.* In other words, the requisite specificity of what is "obscene" can be supplied by judicial construction—a position since abandoned by the author of the *Roth* opinion. And even in *Miller* the majority implied that words such as "obscene" could not meet constitutional muster in the absence of legislative specification or judicial construction. But, as this Court has noted,

> It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could rightfully be detained, and who should be set at large. *United States* v. *Reese*, 92 U.S. 214, 221 (1876). See also, *United States* v. *Robel*, 389 U.S. 258, 275-76 (1967).

Thus, once a statute must depend on judicial construction to remedy its vagueness, its capacity to provide the requisite notice is seriously diminished. And its application tends to become an ad hoc matter devolving upon the attitude of judges, juries, and administrative agencies. The Government should not continue to be allowed to use this facially vague statute to regulate in the First Amendment area.

Since the statute requires judicial construction to save its validity, the question is whether it can bear a construction consonant with the new requirements stated in *Miller* v. *California*.[5] Perhaps the most "obscene" phenomenon

[5] Even assuming that this statute or any other were re-drawn to embody the central elements of the *Miller* holding, it is still doubtful that constitutional standards of specificity would be met. See, *Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U.S. at 78 (dissenting opinion of Justice Brennan). While the kinds of sexual conduct whose

since last June has been the way that some courts have rushed to "construe" their statutes to incorporate the central elements of the *Miller* decision, holding that no matter what the particular statute said or what its authors intended, the new definitions could be read into the enactments. See, *e.g.*, *State* v. *J-R Distributors, Inc.*, 512 P.2d 1049 (Sup. Ct. Wash. 1973); *Grigsby* v. *State*, 14 Cr. L. Rep. 2143 (Tenn. Sup. Ct. 1973); *People* v. *Heller*, —— N.Y.2d —— (Dec. 28, 1973). Fortunately, a number of other courts have invalidated or questioned existing obscenity statutes because they failed to specify the kinds of sexual conduct which could be considered patently offensive. See, *e.g.*, *Literature Inc.* v. *Quinn*, 482 F.2d 372 (1st Cir. 1973); *Hamar Theatres Inc.* v. *Cryan*, 365 F. Supp. 1312 (D. N.J. 1973) (three-judge court), *juris. statement filed*, 42 U.S. Law Week 3365 (Dec. 18, 1973); *Detco Inc.* v. *McCann*, 365 F. Supp. 176 (E.D. Wisc. 1973); *United States* v. *Lang*, 361 F. Supp. 380 (C.D. Cal. 1973); *Stroud* v. *Indiana*, —— Ind. ——, 13 Cr. L. Rep. 2541 (1973); *Louisiana* v. *Shreveport News Agency, Inc.*, —— La. ——, 42 Law Week 2344 (1973). While this Court has implied that it is "prepared" to authoritatively construe Section 1461 as incorporating the *Miller* standards, see *United States* v. *12 200-Foot Reels*, 413 U.S. 123, 130, n.7 (1973), there are limits to the liberty which this Court or any other can take with statutory language or purpose. See, *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515-17 (1964); *Baggett*

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depiction would be prohibitable might be specified with some definiteness, other elements of the new *Miller* test of obscenity remain vague. Under *Miller*, First Amendment rights are made to turn on whether a given work dealing with sexual matters has "serious literary, artistic, political, or scientific value." The "serious value" standard is as uncertain as it is unprecedented.

v. *Bullitt*, 377 U.S. 360 (1964); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 153-54 (1969); *Welsh* v. *United States*, 398 U.S. 333, 354 (1970) (concurring opinion of Justice Harlan); *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F.2d 344 (2d Cir. 1970). The federal statute has been on the books for a century without ever specifying the kind of sexual conduct to which regulation of obscenity must be limited. More than an *ipse dixit* is required to find that this statute embodies such specifications.

Finally, even if the statute can be construed to embody the *Miller* requirements, until this Court explicitly does so, retroactive application of such requirements is impermissible. The decisions last June significantly altered the Court's obscenity doctrines and definitions. To meet the dissenters' contention that concepts in this area could never be stated with the requisite precision, the Court held that obscenity statutes, as written or construed, would have to identify the sexual conduct being regulated. Section 1461 never met these requirements and does not meet them even today. Prospectively construing the statute to comply with *Miller* is questionable enough; retroactively applying that construction to these petitioners is unconstitutional. See *Bouie* v. *Columbia*, 378 U.S. 347 (1964); *Ginzburg* v. *United States*, 383 U.S. 463, 495 (1966) (dissenting opinion of Justice Harlan); *United States* v. *Lang*, *supra*. Such a result embodies all the evils of an *ex post facto* enactment.

CONCLUSION

For the reasons set forth herein, the decision below should be reversed.

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March 1974

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-507

WILLIAM L. HAMLING, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 481 F. 2d 307.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1973. On August 23, 1973 a petition for rehearing was denied (Pet. App. C). The petition for a writ of certiorari was filed on September 18, 1973, and was granted on January 14, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the light of *Miller* v. *California*, 413 U.S. 15, and companion cases, 18 U.S.C. 1461, which makes criminal the mailing of obscene matter, is unconstitutionally vague on its face or as applied to petitioners' pre-*Miller* conduct.

2. Whether, in light of *Miller*, the indictment framed in the terms of the statute was sufficiently definite to advise petitioners of the offenses charged against them.

3. Whether the trial court properly instructed the jury with regard to the material's prurient appeal to sexually deviant groups, with regard to pandering, and with regard to the mental elements required to prove a violation of 18 U.S.C. 1461 and 371.

4. Whether the jury and the court of appeals properly found that the advertisement was obscene.

5. Whether the trial court properly excluded alleged comparable materials from evidence.

6. Whether the evidence was sufficient to support the convictions.

7. Whether the court below correctly held that petitioners were not prejudiced when the trial court heard their objections to the jury instructions at bar, but did not dismiss the jury in strict accordance with Rule 30, Fed. R. Crim. P.

8. Whether the petit jury panel was selected from a fair cross-section of the community, and whether the court's *voir dire* was adequate.

9. Whether the grand jury was prejudiced against petitioners.

STATUTES INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 1461 provides in pertinent part:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> * * * * *
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made * * *
>
> * * * * *
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of Title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom

it is addressed, or knowingly takes any such thing from the mails for the purpose of circulation of disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

* * * * *

STATEMENT

1. This case involves a scheme to distribute a book entitled, *The Illustrated Presidential Report of The Commission on Obscenity and Pornography.*[1] The book contained the text of the official *Report of the Commission on Obscenity and Pornography* and numerous photographs asserted to be "examples of the type of subject matter" discussed and used by the Commission. The *Illustrated Report* was widely advertised by a mailed brochure whose inside page, containing a collage of photographs from the *Illustrated Report*, is described by the court of appeals, as follows (the brochure is reproduced at J.A. 92A)[2] (481 F. 2d at 316–317):

> The folder opens to a full page splash of pictures portraying heterosexual and homosexual intercourse, sodomy and a variety of deviate sexual acts. Specifically, a group picture of nine persons, one male engaged in masturbation, a female masturbating two males, two couples engaged in intercourse in reverse fashion while one female participant engages in fellatio of a

[1] Hereafter referred to as the "*Illustrated Report*" or the "*Report.*"

[2] J.A. refers to the appendix in this Court.

male; a second group picture of six persons, two males masturbating, two fellatrices practicing the act, each bearing a clear depiction of ejaculated seminal fluid on their faces; two persons with the female engaged in the act of fellatio and the male in female masturbation by hand; two separate pictures of males engaged in cunnilinction; a film strip of six frames depicting lesbian love scenes including a cunnilinguist in action and female masturbation with another's hand and a vibrator, and two frames, one depicting a woman mouthing the penis of a horse, and a second poising the same for entrance into her vagina.

2. On March 5, 1971, a Grand Jury in the United States District Court for the Southern District of California indicted petitioners William L. Hamling, Earl Kemp, Shirley R. Wright, David L. Thomas, Reed Enterprises, Inc., and Library Service, Inc., on twenty-one counts of an indictment charging use of the mails to carry an obscene book (*the Illustrated Report*), an obscene advertisement, and advertisements giving information as to where, how, and from whom and by what means the *Report* might be obtained, and of conspiracy to commit the above three offenses, in violation of 18 U.S.C. 2, 1461 and 371.[3] Prior to trial, petitioners moved to dismiss the indictment on the grounds that it failed to inform them of the charges, and that the grand jury had insufficient

[3] Greenleaf Classics, Inc., the publisher of the *Illustrated Report*, was also indicted, but was acquitted on the counts involving the advertisements, including conspiracy, and the jury was unable to reach a decision on the counts involving the *Illustrated Report*.

evidence before it to return an indictment and was improperly instructed on the law. Petitioners also challenged the petit jury panel and moved to strike the venire on the ground that the plan for selection of grand and petit jurors in the Southern District of California systematically excluded all persons under 25 years of age. The district court denied all of these motions.

Following a jury trial, petitioners were convicted on twelve counts of mailing and conspiring to mail the obscene advertisement.[4] Petitioner Hamling was sentenced to imprisonment for one year on the conspiracy count, and consecutive to that, concurrent terms of 3 years each on the eleven substantive counts, and he was fined $32,000; petitioner Kemp was sentenced to imprisonment for one year and a day on the conspiracy count, and consecutive to that, concurrent terms of two years each on the eleven substantive counts; petitioners Wright and Thomas received suspended sentences of one and one-half years, and were placed on probation for five years; petitioners Reed Enterprises, Inc., and Library Service, Inc., were fined $43,000 and $12,000, respectively.

The court of appeals affirmed in a lengthy opinion. After reconsidering a petition for rehearing in light *of Miller* v. *California,* 413 U.S. 15, and companion

[4] The court dismissed four of the substantive counts for lack of proof, because the persons to whom the *Report* or the advertisement were mailed were not available to testify at trial. The jury was unable to reach a decision on five of the counts dealing with mailing the *Illustrated Report* and advertising how and where to get it.

cases[5] (Pet. App. B), the court denied rehearing (Pet. App. C). The court said (Pet. App. 39–40):

> We heretofore determined that the evidence was abundantly sufficient to meet, and the District Court's jury instructions in full compliance with, the essential elements of the *Roth-Memoirs* test. *United States* v. *One Reel of Film, et al.*, — F.2d — (1st Cir., July 16, 1973, No. 73–1181) at pages 5 and 7 of the slip opinion, in considering the same problem, succinctly states:
>
> "*A fortiori* the more relaxed standards announced by the Supreme Court were met.
>
> "[W]e see no possible reason to remand, especially as the Supreme Court has just addressed itself to the construction and adequacy of the federal statute involved. See *United States* v. *12 200-Ft. Reels of Super 8mm. Film, supra,* 41 U.S.L.W. at 4963, n. 7."

3. The facts adduced at trial showed that postal patrons in various parts of the country received the brochure advertising the *Illustrated Report* (J.A. 101–122). The mailings these persons received consisted of an outer envelope, an inner return envelope addressed to Library Service, Inc., P.O. Box 20308, San Diego, California 92120, and the brochure itself (which also identified Library Service, Inc., at the same address, as the party responsible for the mailing). The outer envelopes bore a postmark that indicated they were mailed from North Hollywood, California, on or about

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[5] *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49; *United States* v. *Orito*, 413 U.S. 139; *United States* v. *12 200 Ft. Reels of Super 8mm. Films*, 413 U.S. 123; *Kaplan* v. *California*, 413 U.S. 115.

January 12, 1971, and that the postage was affixed to the envelopes by Pitney-Bowes Meter No. 137583 (Gov. Exhs. 2–5, 7–13).*

The mailing of these brochures was accomplished by petitioners through the use of other businesses. Approximately 55,000–58,000 of these brochures were placed in envelopes and postage was affixed to them by Richard and Venita Harte, who operate the Academy Addressing and Mailing Service (J.A. 123–126). The brochures and the Pitney-Bowes Meter No. 137583, with which they affixed the postage, were supplied to them by Bernard Lieberman of Regent House, Inc. of North Hollywood, California (J.A. 123–126) who, on January 11, 1971, had paid the United States Postal Service to set $3,300 worth of postage on Meter No. 137583 (Gov. Exhs. 26–29). Regent House was billed $541.15 by the Harte's for their services (J.A. 129–130). Regent House in turn charged its services and costs for the postage and the Harte's mailing service to Reed Enterprises, Inc., which paid the bill on January 19, 1971 with a check signed by petitioner Hamling (Gov. Exhs. 47, 48).

Those individuals responding to the brochure would be sent copies of the *Illustrated Report,* which would be mailed with postage affixed by Pitney-Bowes Meter No. 901613 which was installed at Library Service, Inc., at the direction of Mr. James Fernandez, an employee of Pitney-Bowes (R.T. 504–506). The rental agreement for this meter was signed for Library Service by petitioner David Thomas, whom Fernandez

* "Gov. Exh." refers to the government's exhibits at trial; "R.T." refers to the transcript of the trial proceedings.

identified as the person with whom he had dealt on this matter (J.A. 132–134; Gov. Exhs. 40a, b, and c).

The individual petitioners were all shown to be officers in the corporate petitioners, and they were shown to be intimately involved with selling the *Illustrated Report,* which entailed mailing out the advertisement brochure. Petitioner Hamling, as president of Reed Enterprises (Gov. Exhs. 30–31), signed the check on the corporation's behalf in payment to Regent House for the mailing of the advertisement (Gov. Exhs. 47, 48). Petitioner Kemp was vice president of Greenleaf Classics, Inc. and Library Service, Inc. J.A. 145–146), as well as editor of the *Illustrated Report.* He signed the application on behalf of Library Service, Inc. for post office box 20308, which was the same post office box on the return envelope sent with the advertisement and on the advertisement itself (J.A. 140–146; Gov. Exhs. 38c, 39a and c). Petitioner Thomas signed the rental agreement for postage meter No. 901613 which was used in affixing postage for sending copies of the *Illustrated Report,* and which Thomas directed to be installed at Library Service (J.A. 132–134; Gov. Exhs. 40a, b, and c).

Petitioner Wright was the secretary of Reed Enterprises and Greenleaf Classics, Inc. (J.A. 145; Gov. Exhs. 30–36). Wright assisted the postal superintendent in getting Kemp's signature on the application for post office box 20308 (J.A. 141–143). Wright also received a memorandum from London Press, Inc., the printer of the *Illustrated Report,* addressed to her as representative of Reed Enterprises, Inc., confirming the shipment of 28,537 copies of the *Illustrated*

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Report (Gov. Exh. 51). Numerous other corporate documents evidenced the individual petitioners' intimate involvement with the corporate petitioners (Gov. Exhs. 30–37a, 84–90).

Three expert witnesses testified for the government on the obscenity of the materials involved. Dr. Roy Madsen, an expert in the field of communications, testified primarily about the *Illustrated Report*. Dr. Melvin Anchell, a psychiatrist from Los Angeles, testified that the dominant theme of the brochure was "pruriency" (J.A. 147). Frank Getlein of Washington, D.C., a syndicated journalist with the Washington Evening Star, was qualified as an expert on both national contemporary community standards regarding the depiction of sexual matters and redeeming social value. He testified that the brochure was patently offensive by contemporary community standards and was utterly without redeeming social value (J.A. 149–151).

Petitioners' experts, Dr. W. Cody Wilson and Dr. Otto N. Larsen, testified that the brochure did not appeal to prurient interest and that it did not go beyond customary limits of candor in sexual matters and was not patently offensive (J.A. 166–169, 190–194). In addition, Professor Dwight V. Swain, a professor of Journalism and Literature, testified that the brochure had redeeming social importance (J.A. 185).[7]

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[7] Contrary to petitioners' statement (Pet. Br. 11–12, 60), the government never stipulated that every picture in the *Illustrated Report* was related to the text of the official Commission Report. The only stipulation in that regard was that every picture in the *Illustrated Report* was "similar to at least some of the material that was used by some of the researchers in some of

SUMMARY OF ARGUMENT

1. The decisions of this Court last Term in *Miller* v. *California*, 413 U.S. 15, and companion cases, establishing standards of obscenity, do not make 18 U.S.C. 1461 unconstitutionally vague on its face or as applied to petitioners' pre-*Miller* conduct. Petitioners were tried and convicted under the *Roth-Memoirs* definition of obscenity. For the most part that definition imposed more stringent burdens of proof on the government than is required under *Miller*, and to that extent petitioners were not prejudiced by a trial under *Roth-Memoirs*. The only aspect of *Miller* which could conceivably create First Amendment protections not available before that decision is the requirement of specificity in obscenity laws. We argue first that the requirement does not suggest that 18 U.S.C. 1461 was unconstitutionally vague on its face before it was given a limiting construction. We next argue that *as applied* to petitioners Section 1461 complied with the *Miller* specificity requirement because the brochure concededly involved explicit sexual material which the jury found "patently offensive."

We also contend that the instruction to the jury to apply "national community standards" of obscenity did not make the statute vague. While *Miller* suggests that "contemporary community standards" should now be applied in federal obscenity prosecutions, it does not suggest that the use of a national standard—which was "correctly regarded" as "controlling" at

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the Commission Work—of the Commission on Obscenity and Pornography" (J.A. 163–166).

the time of trial (413 U.S. at 30)—was constitutionally deficient. In any event petitioners were not prejudiced by the application of a national standard.

2. The indictment, which tracked the language of 18 U.S.C. 1461, was sufficiently definite. "Obscene" is a legal term of art, and an indictment using that term necessarily warns a defendant that he will be tried under the judicial definition of that term.

3. The trial court's rulings on the obscenity issues were correct. The court properly excluded evidence of alleged "comparables" because expert testimony on the same issue was available and less likely to confuse the jury. The instruction that the petitioners' knowledge of the obscenity of the materials is irrelevant was proper. The government need only show that the petitioners were aware of the contents of the materials they mailed. The instruction on appeal to deviant groups was proper because there was support in the evidence of appeals to groups other than heterosexuals. The instruction on pandering was similarly proper because it was supported by petitioners' unsolicited distribution of tens of thousands of copies of the brochure and by the contents of the brochure itself.

4. The brochure (see Statement, *supra,* p. 4–5 and J.A. 92a) was plainly obscene. The jury viewed the materials and heard the expert testimony; its judgment should not be disturbed. Petitioners suggest that the brochure is not obscene because the *Illustrated*

Report was not obscene. But, as the court below said, their "premise is false" (481 F. 2d at 315), because there was no jury finding that the *Report* was not obscene.

5. The evidence supports the convictions (see Statement, *supra*, pp. 7–10 and Point V, *infra*, pp. 63, 68).

6. The refusal of the trial judge to dismiss the jury before hearing objections to his instructions, while technically improper, did not prejudice petitioners. There is no suggestion that the jury overheard the bench conference and, in any event, it concerned issues which were wholly legal rather than factual. The refusal to grant a continuance to replenish the jury wheel was proper because "young adults" were not systematically excluded by the jury lists. In any event, petitioners never showed that "young adults" (between 18 and 24) were a distinct group whose absence prejudiced them. The trial judge's *voir dire* of the jury was adequate. He asked questions relating to prejudice involving obscenity; his refusal to explore the jurors' religious beliefs was not an abuse of discretion.

7. There is no evidence that the Grand Jury was prejudiced against petitioners. The observation of the court below about "a supposition [of bias or prejudice] as to how the members [of the Grand Jury] may have reacted upon a view of the Brochure and Report" (481 F. 2d at 313) was simply a statement that petitioners' claim was "supposition," unsupported by any evidence.

ARGUMENT

I. *MILLER* v. *CALIFORNIA* DOES NOT RENDER 18 U.S.C. 1461 UNCONSTITUTIONALLY VAGUE ON ITS FACE OR AS APPLIED TO PETITIONER'S PRE-*MILLER* CONDUCT

A. INTRODUCTION

The principal issue in this case is what standards govern the review of federal obscenity convictions that occurred before but had not become final on the day *Miller* v. *California*, 413 U.S. 15, and related cases, were decided. The correct answer, we believe, was given in *United States* v. *Palladino* (C.A. 1), No. 72-1005, decided January 7, 1974, slip op., p. 2:

> We must now decide to what extent the standards articulated in the recent Supreme Court decisions dealing with state obscenity statutes apply to this federal case retroactively. The defendants are caught in a period of transition, their prosecutions having taken place before the *Miller* decisions. They cannot fairly be subjected to penalties for violation of rules established after their actions. On the other hand, the remand of the entire group of pending obscenity prosecutions suggests that to the extent that *Miller* creates protections not afforded by prior standards, these cannot be denied to persons whose prosecutions have not terminated. * * * [Footnote omitted].

See also, *United States* v. *Thevis*, 484 F. 2d 1149 (C.A. 5), petition for a writ of certiorari pending, Nos. 73-1075, 73-1091.*

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* We do not, however, agree with the First Circuit's disposition of the "community standards" issue in *Palladino*, see *infra*, pp. 25-31.

Petitioners were tried under the then prevailing *Roth-Memoirs* definition of obscenity.[9] In most respects this definition imposed a substantially more stringent burden on the government to prove obscenity than the guidelines laid down in *Miller*.[10] The requirement in *Roth-Memoirs* of a finding of "appeal to the prurient interest" is not significantly different from the statement of that element in *Miller*. Manifestly the requirement of *Roth-Memoirs* that the materials be shown to be "utterly without redeeming social value or importance" imposed a greater burden on the government than showing that they "lack * * * serious literary, artistic, political, or scientific value" (*Miller, supra*, 413 U.S. at 24). Indeed it was avowedly to relieve the government of this constitutionally unnecessary and "virtually impossible to discharge * * *" burden of proof that the *Miller* standard was formulated (*id* at 22).

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[9] *Roth* v. *United States*, 354 U.S. 476; *Memoirs* v. *Massachusetts*, 383 U.S. 413. "[U]nder the *Roth* definition 'as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value'." *Miller*, *supra*, 413 U.S. at 21 (quoting from *Memoirs* v. *Massachusetts*, *supra*, 383 U.S. at 418).

[10] "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest * * *; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24.

It is only with respect to the second element of obscenity in *Miller* that there is a difference which is arguably a limitation of the scope of prosecutions under *Roth-Memoirs*. *Miller* requires that the material in question depict or describe "in a patently offensive way, sexual conduct specifically defined by the applicable state [11] law".[12] Since the requirement of specificity "creates protections not afforded by prior standards, these cannot be denied to [petitioners]" (*United States* v. *Palladino, supra,* slip op. at p. 2, see also, *id.* at p. 3).

However, as we will argue hereafter (*infra,* B), 18 U.S.C. 1461 has received an authoritative construction giving it the required specificity. *United States* v. *12 200-Ft. Reels of Film, supra,* 413 U.S. at 130, n. 7. Since petitioners' publication was well within the core meaning of the statute as it has now been limited, as applied to them the statute was not vague even before it received a limiting construction.

The second aspect of *Miller* which will require discussion is the recognition that a local community standard for judging obscenity passes constitutional muster

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[11] "[The *Miller*] standards are applicable to federal legislation." *United States* v. *12 200-Ft. Reels of Super 8mm. Film,* 413 U.S. 123, 130.

[12] As examples of "sexual conduct" which might be "specifically defined" in an obscenity law, the Court suggested (*Miller, supra,* 413 U.S. at 25):

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

(413 U.S. at 30–34). We will argue (*infra*, C) that, while the application of "contemporary community standards" is constitutionally permissible and preferable, the application of a national standard in this case did not make the statute vague or prejudice the petitioners.

B. THE FACT THAT 18 U.S.C. 1461 DID NOT CONTAIN A SPECIFIC DESCRIPTION OF LEWD SEXUAL CONDUCT DID NOT MAKE THAT STATUTE UNCONSTITUTIONALLY VAGUE ON ITS FACE OR AS APPLIED TO PETITIONERS' CONDUCT BEFORE *MILLER*

In *United States* v. *12 200-Ft. Reels of Film, supra*, 413 U.S. at 130, n. 7, this Court limited the literal reach of 18 U.S.C. 1461 by construing the statutory terms "obscene", "lewd", etc. to reach only "patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California*, * * *."[13] While petitioners acknowledge that this construction precludes any future challenge to the statute on vagueness grounds (Pet. Br. 29), they also argue the converse: that prior to this limiting construction Section 1461 was unconstitutionally vague. This argument overlooks the repeated decisions of this Court prior to *Miller* sustaining Section 1461 and, more importantly, overlooks the fact that since the petitioners' conduct was well within the statute as now limited, it was not vague as applied to them.

1. In *Roth* v. *United States*, 354 U.S. 476, this Court upheld the constitutionality of 18 U.S.C. 1461 against a contention that "the statutes do not provide rea-

[13] The Court referred only to 19 U.S.C. 1305(a) and 18 U.S.C. 1462, but 18 U.S.C. 1461 uses the same statutory terms and would presumably receive the same construction.

sonably ascertainable standards of guilt * * *." In rejecting this claim the Court said:

> Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. * * * "[T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. * * *" *United States* v. *Petrillo,* 332 U.S. 1, 7–8. These words ["obscene", "lewd", etc.], applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark "* * * boundaries sufficiently distinct for judges and juries fairly to administer the law * * *" [*id.* at 491].

Prior to *Miller and 12 200-Ft. Reels of Film,* the Court reaffirmed this holding in *United States* v. *Reidel,* 402 U.S. 351, 353–354.[14] Thus, at the time of petitioners' conduct and at the time of their trial, in the view of this Court, 18 U.S.C. 1461 provided ascertainable standards of guilt and was not unconstitutionally vague.

Nor did *Miller* or its companion cases suggest the contrary. At no point in *Miller* and its companion cases did this Court indicate that it was abandoning

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[14] As noted by Justice Harlan, speaking for the Court in *Manual Enterprises* v. *Day,* 370 U.S. 478, 483, "[T]he statute [1461] since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex."

the *Roth-Memoirs* standards because those standards made obscenity statutes unconstitutionally vague. See *United States* v. *Thevis,* 484 F.2d 1149 (C.A. 5); *United States* v. *One Reel of Film,* 481 F.2d 206 (C.A. 1); *United States* v. *Gordon and Fleisher,* Cr. No. 73–20 (D. Vt., February 20, 1974); *United States* v. *Guarino, et al.,* Nos. 7968, 7970–7972 (D. R.I., November 14, 1973); *United States* v. *Marks,* 364 F. Supp. 1022, 1026 (E.D. Ky.); *United States* v. *Dorfman and Roka Film Enterprises,* Nos. 181–73 and 331–73 (D. D.C., August 31, 1973). Rather, the Court concluded that *Memoirs* imposed greater burdens on the regulation of obscenity than were intended by the *Roth* majority. As the Court stated (*Miller, supra,* 413 U.S. at 21–22):

> While *Roth* presumed "obscenity" to be "utterly without redeeming social importance." *Memoirs* required that to prove obscenity it must be affirmatively established that the material is "*utterly* without redeeming social value." Thus, even as they repeated the words of *Roth,* the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, *i.e.,* that the material was "*utterly* without redeeming social value"—a burden virtually impossible to discharge under our criminal standards of proof. * * *

This language hardly suggests that the Court viewed Section 1461, as construed by *Roth-Memoirs,* to be unduly vague. If anything the implication is that the *Roth-Memoirs* construction was unnecessarily strict, thereby depriving the government of constitutionally

valid convictions by imposing an "impossible" standard of proof.

Furthermore, the remands this Court ordered since *Miller*, in numerous pre-*Miller* federal obscenity convictions, to the courts of appeals for further consideration in light of *Miller*,[15] indicate that convictions under the *Roth-Memoirs* standards are not defective because of a vague statute or otherwise. If they were, the Court would have reversed or vacated those convictions.

2. We have already noted that to the extent that *Miller*'s specificity requirements create new protections for defendants, they should be applied in the review of non-final convictions, such as petitioners'. But this is not to say that before *Miller* Section 1461 was unconstitutionally vague on its face for failure to articulate the specific sexual conduct to be regulated.

In *Miller, supra*, 413 U.S. at 24, the Court held that regulation of obscene material was limited "to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state [or federal] [16] law, as written or authoritatively construed." The Court pointed out in a footnote that it was not holding all state obscenity statutes inadequate, and that existing statutes, "as construed heretofore or hereafter, may well be adequate," citing its own

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[15] See, *e.g.*, *Groner* v. *United States*, No. 72–1731 vacated and remanded, October 23, 1973; *Miller* v. *United States*, 413 U.S. 913; *Cangiano* v. *United States*, 413 U.S. 913; *Cote* v. *United States*, 413 U.S. 915; *United States* v. *Palladino*, 413 U.S. 916.

[16] "[*Miller*] standards are applicable to federal legislation." *United States v. 12 200-Ft. Reels of Film*, *supra*, 413 U.S. at 130.

construction of the federal statutes in *United States* v. *12 200-Ft. Reels of Film, supra,* 413 U.S. at 130, n. 7. *Miller, supra,* 413 U.S. at 24, n. 6.

In *12 200-Ft. Reels of Film, supra,* 413 U.S. at 130, n. 7, the Court said:

> *If and when* such a "serious doubt" is raised as to the vagueness of the words "obscene," "lewd," "lascivious," "filthy," "indecent," or "immoral" as used to describe regulated material in 19 U.S.C. § 1305(a) and 18 U.S.C. § 1462 * * * [and 18 U.S.C. 1461], we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller* v. *California, ante,* at 25. * * * [Emphasis added.]

The Court's use of the words "[i]f and when" suggests that there has not yet been a "serious doubt" raised as to the vagueness of these terms as used in federal obscenity statutes. *United States* v. *Gordon and Fleisher, supra,* slip op. at p. 5.

If the asserted vagueness problems raised a "serious doubt" as to the facial validity of federal obscenity statutes, either before or as a result of *Miller,* this Court would have considered them in the two federal cases challenging the constitutionality of 18 U.S.C. 1462 and 19 U.S.C. 1305(a) decided together with *Miller.*[11]

The *Miller* examples of lewd sexual conduct which the Court incorporated into 18 U.S.C. 1461 by *12 200-Ft. Reels of Film* do not materially change the scope

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[11] *United States v. 12 200-Ft. Reels of Film, supra; United States* v. *Orito,* 413 U.S. 139.

of that statute. The proscribed specific "hard core" sexual conduct which the Court read into the obscenity statute was derived from those materials judicially found to be obscene (or non-obscene) in past cases. See *Miller, supra,* 413 U.S. at 27, 29; *Ginzburg* v. *United States,* 383 U.S. 463, 499, n. 3 (Justice Stewart dissenting); *Jacobellis* v. *Ohio,* 378 U.S. 184, 197 and cases cited in footnote one (Justice Stewart concurring); *Manual Enterprises* v. *Day,* 370 U.S. 478, 489–490. Thus, the Court's action in *12 200-Ft. Reels of Film,* in reading specificity into the statute was simply in accord with the settled meaning of the statute.

In sum, there is no basis for concluding that 18 U.S.C. 1461 was void on its face before *Miller* was decided.

3. But even if the limiting construction of *Miller* and *12 200-Ft. Reels of Film* was needed to save the statute from facial invalidity, petitioners are in no position to complain, because the statute was clearly constitutional as applied to them. Although petitioners' advertisements were mailed before the limiting construction, they clearly fall within the class of "patently offensive representations * * * of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California* * * *" (413 U.S. at 130, n. 7).

The examples of proscribable representations given in *Miller,* include "[p]atently offensive representation * * * of ultimate sexual acts, normal or perverted, actual or simulated * * * [, and] of masturbation * * *

and lewd exhibition of the genitals."[13] It was stipulated at trial that the representations in the *Illustrated Report* were "sexually explicit material," including "pictures having to do with sexual activity between humans and animals" (J.A. 163–164). Since each of the pictures in the advertising brochure also appears in the *Report*, it is uncontested that the brochure depicts explicit sexual activities. Moreover, the jury specifically found that the representations were "patently offensive" (J.A. 238) as required under both *Roth-Memoirs* and *Miller*.

Since the jury resolved the issue of patent offensiveness against the petitioners, and since it is undisputed that the material includes depiction of explicit sexual acts and exhibition of the genitals, there is no need to resubmit to the jury the issue of whether the brochure contains patently offensive depictions of explicit sexual conduct. See *United States* v. *Cabbell*, 427 F. 2d 147 (C.A. 4); *United States* v. *Salliey*, 360 F. 2d 699 (C.A. 4), cf. *United States* v. *Capitol Meats*, 166 F. 2d 537 (C.A. 2), certiorari denied, 334 U.S. 812; *Crichton* v. *United States*, 92 F. 2d 224 (C.A. D.C.), certiorari denied, 302 U.S. 702.

4. The statute's specificity requirement fashioned by *Miller and 12 200-Ft. Reels of Film*, can be applied to petitioners' pre-*Miller* conduct without violating the due process right of fair warning recognized in *Bouie* v. *City of Columbia*, 378 U.S. 347. The Court in *Bouie* stated (378 U.S. at 352):

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[13] The *Miller* examples (413 U.S. at 25) are set out in note 12, *supra*, p. 16.

> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforseeable and retroactive judicial *expansion of narrow and precise statutory language*. * * * [Emphasis added.]

The *limiting* interpretation made by *12 200-Ft. Reels of Film* is not a "retroactive judicial *expansion* of narrow and precise statutory language" (378 U.S. at 352). Precisely the opposite is true. The application of the statute, as construed with more narrow and precise language, to petitioners' pre-*Miller* conduct, which was clearly a criminal offense under the pre-*Miller* construction of the statute, violates no due process right or *ex post facto* principle. Compare *Bouie, supra*, 378 U.S. at 353–354.

It is only a judicial construction which makes criminal conduct which was legal before a court's decision that invokes *ex post facto* considerations. But as we have pointed out, the substantive elements of the *Miller* test—which arguably expand the category of obscene material beyond the *Memoirs* formulation—have no applicability to petitioners' pre-*Miller* conduct. The specificity requirement—which arguably *narrows* the category of obscene material—does have application to petitioners' pre-*Miller* conduct. But giving petitioners the benefit of that limiting construction, the statute, as we have seen, was nonetheless properly applied to them.

C. THE FACT THAT THE JURY WAS INSTRUCTED TO APPLY "NATIONAL COMMUNITY STANDARDS" DID NOT MAKE 18 U.S.C. 1461 UNCONSTITUTIONALLY VAGUE AS APPLIED TO PETITIONERS

In *Miller* this Court held that, in state obscenity prosecutions, the use of a statewide community standard of obscenity was "constitutionally adequate" (413 U.S. at 34). The Court also characterized "national standards" as "hypothetical and unascertainable" (413 U.S. at 31). From this, petitioners argue (Pet. Br. 29–33) that the trial court's charge, requiring the jury to apply "national community standards" (J.A. 238), rendered 18 U.S.C. 1461 unconstitutionally vague as applied to them.

1. In *Miller*, the Court held that the First Amendment does not require the use of a national standard of obscenity in a state obscenity prosecution (413 U.S. at 30–34). Since the First Amendment applies equally to the states and the federal government (*Stromberg* v. *California*, 283 U.S. 359, 368), it would appear that there is no First Amendment obstacle to the application of local community standards in federal obscenity cases. This conclusion is bolstered by the Court's summary of its holdings in *Miller, supra*, 413 U.S. at 36–37. The Court said: "In sum, we * * * hold that obscenity, is to be determined by applying 'contemporary community standards,' see *Kois* v. *Wisconsin*, [408 U.S. 229] *supra*, at 230, and *Roth* v. *United States*, *supra*, at 489, not 'national standards'." The Court's citation of both *Kois*, a state case, and *Roth*, a federal

case, indicates that "contemporary community standards" should be applied in federal, as well as state, prosecutions.

If we correctly understand the implication of *Miller* to be that "contemporary community standards" should be applied in federal obscenity prosecutions, we agree entirely with that conclusion. But we do not understand *Miller* to hold that all the convictions which have been obtained under national standards of obscenity are constitutionally defective. In *Miller*, the Court said (413 U.S. at 30–31):

> a "national" standard of First Amendment protection enumerated by a plurality of this Court, was *correctly regarded* at the time of trial as limiting state [and federal] prosecution under controlling case law. [Emphasis added.]

To say that a national standard of obscenity was "correctly regarded" as "controlling" is not to imply that the use of such a standard was constitutional error. In fact, petitioners agree with us that the trial court was correct in applying a "national standard" (Pet. Br. 29). They argue, however, that use of such standards rendered Section 1461 unconstitutionally vague under the Fifth Amendment.

2. We first consider the preference of "contemporary community standards," before turning to the asserted vagueness of the national standard applied in this case (*infra*, 3).

The requirement of a national standard of obscenity has never commanded a majority in this Court. In *Roth* v. *United States*, 354 U.S. 476, 489, the Court did not designate the boundaries of the community

whose standards were to be applied. The Court first considered the issue of geographical boundaries of the relevant community in *Manual Enterprises* v. *Day*, 370 U.S. 478, 488. Mr. Justice Harlan, in an opinion joined only by Mr. Justice Stewart, said that, in a federal prosecution, the relevant community should be the nation. Next, in *Jacobellis* v. *Ohio*, 378 U.S. 184, 192–195, Mr. Justice Brennan, in an opinion joined only by Mr. Justice Goldberg, said that a national standard should also be applied to state obscenity prosecutions. Mr. Chief Justice Warren, joined by Mr. Justice Clark, dissented, believing that there were no provable national standards. 378 U.S. at 200.

Thus, the national community standard test prior to *Miller* rested on two minority opinions. In his dissent in *Ginzburg* v. *United States*, 383 U.S. 463, 479, Mr. Justice Black expressed his lack of certainty as to which geographical area was included in the "community" standard.

In *Miller*, the Court said (413 U.S. at 30):

> Under a national Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. * * *

The Court continued (*ibid.*):

> The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. * * *

These considerations in favor of the use of community standards would seem to be equally applicable to both state and federal prosecutions.

The Court's discussion recognizes that the demand upon juries to find and apply a national standard of obscenity is an historical anomaly. Traditionally juries have "draw[n] on the standards of their community" (413 U.S. at 30). They should be allowed to do so in obscenity cases unless there is compelling reason to ask them not to do so. In *Miller* the Court recognized that, however well-intentioned it was, the quest for a national standard had been "unrealistic" (413 U.S. at 30). The Court has, therefore, decided to return to a reliance on the traditional fact-finding methods of the jury, and hence to return to "community standards."

In our view the relevant community in federal obscenity prosecutions should be the federal judicial district. See *United States* v. *Groner*, 479 F. 2d 577, 581–583 (C.A. 5). Federal judicial districts do not always coincide with state lines, but the use of the judicial district as the relevant community is more realistic and practical than a state or the city where the court is sitting. The jurors in federal cases are drawn from a cross-section of the "community" in the judicial district (see 28 U.S.C. (Supp. 1972) 1861),

and are therefore familiar with the standards of that "community." Since, as noted in *Miller, supra,* 413 U.S. at 30, the jury has historically "draw[n] on the standards of their community * * *," the jurors in federal obscenity cases should be permitted to draw on those standards with which they are familiar, and not apply standards arbitrarily settled upon by geography and about which the jurors may know very little. This is especially important in view of the fact that no expert testimony is necessary to prove the standards. *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49.

3. The recognition that the application of "contemporary community standards" more realistically effectuates First Amendment values does not entail the conclusion that all prosecutions applying a national standard of obscenity are void *ab initio.*

We have noted that, at the time of trial a national standard was "correctly regarded" as "controlling" (*Miller, supra,* 413 U.S. at 30). The *Miller* formulation may be viewed as a means of sharpening the fact-finding process of the jury. But it does not follow that all previous fact-finding was constitutionally deficient. There is no reason to assume that juries in pre-*Miller* cases could not and did not determine a workable national standard. Indeed, since *Miller* some courts of appeals have found that national standards are still ascertainable and appropriate in federal cases. In *United States* v. *Palladino, supra,* slip op. at p. 8, the First Circuit stated a preference for a national standard, then added:

> All this is not to say that evidence of national standards of prurient appeal and patent offensiveness will be unmarred by serious dispute. But neither can we say that such evidence will never be clear * * *. And the effort to identify a national standard of tolerance would seem to differ only in degree from the effort, upheld in *Miller* to identify a state-wide standard in such a large, populous, and variegated state as California.

Our submission is that the use of a national standard of obscenity, at least when supported (as it was here) by expert testimony, was not too vague for the jury to grasp and apply.

The Court's primary concern in using community standards is to assure that the material is not judged by the personal opinion of each juror, and that it is not judged by its effect on a particularly sensitive or insensitive person or group. *Miller, supra,* 413 U.S. at 33; *Mishkin* v. *New York,* 383 U.S. 502, 508–509; *Roth, supra,* 354 U.S. at 488–489. This concern is satisfied whether a local or a nationwide standard is used.

It is highly unlikely that the petitioners could have been prejudiced by the application of a national standard. The case was tried in the Southern District of California. Petitioners could have benefited from the application of a local standard only on the unlikely hypothesis that the jurors would have found their own community more permissive than the nation as a whole.

It is more reasonable to conclude that juries are always guided by their perception of their com-

munity's values and that the instructions to apply "national standards" do not markedly change that perception.

Accordingly, we submit that petitioners were not prejudiced by the application of a national standard. This is especially true in light of the material involved here, which is obscene under any standard. In short, if it were error not to apply a local standard in this case, the error was harmless.

D. NEITHER THE "UTTERLY-WITHOUT-REDEEMING-SOCIAL-VALUE" TEST NOR THE ABSENCE OF A MAJORITY OPINION SINCE ROTH RENDERED 18 U.S.C. 1461 UNCONSTITUTIONALLY VAGUE

Focusing on the question in the dissenting opinion of Mr. Justice Harlan in *Memoirs* v. *Massachusetts*, 383 U.S. 413, 459 (cited in *Miller, supra*, 413 U.S. at 22) whether utterly without redeeming value, "has any meaning at all," petitioners argue (Pet. Br. 34–39), that this test and the "ad hoc" nonmajority decisions in obscenity cases prior to *Miller* made 18 U.S.C. 1461 vague and unworkable.

1. The rejection of the utterly-without-redeeming-social-value test in *Miller* was not because the test was vague. The Court in *Miller* rejected the test because it was not a part of the definition of obscenity approved in *Roth*, and because it placed too heavy a burden of proof on the prosecution. The Court stated (413 U.S. at 21–22):

> While *Roth* presumed "obscenity" to be "*utterly* without redeeming social importance," *Memoirs* required that to prove obscenity it must be affirmatively established that the ma-

> terial is "*utterly* without redeeming social value". Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative * * * a burden virtually impossible to discharge under our criminal standards of proof. * * *

The fact that it is impossible or difficult for the prosecution to prove a negative does not render the definition of obscenity vague. Indeed, it is particularly ironic for the defendants to base a claim of statutory vagueness on the difficulty of the government making out its case against them.

The meaning of the utterly-without-redeeming-social-value test announced in *Memoirs* is found in *Roth* v. *United States*, 354 U.S. 476, 484, 487 and *Jacobellis* v. *Ohio*, 378 U.S. 184, 200:

> The portrayal of sex, *e.g.*, in art, literature, and scientific works, is not itself sufficient reason to deny material the constitutional protection of [the] freedom of speech and press. [*Roth, supra*, 354 U.S. at 487; footnote omitted.]
>
> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties * * *. [*Id.* at 484.]

In *Jacobellis, supra*, 378 U.S. at 191, the Court after citing portions of the above quotations from *Roth*, stated:

> It follows that material dealing with sex in a manner that advocates ideas, * * * or that has literary or scientific or artistic value or any

other form of social importance, may not be branded as obscenity and denied the constitutional protection.

The test announced in *Memoirs* incorporated this rationale into the standards for judging obscenity, in order to provide further protection from suppression of protected material. The Court's problem in *Miller*, therefore, was not with the vagueness of the test, but with the fact that it required the prosecution to prove the material *"utterly* without redeeming social value," which imposed "a burden virtually impossible to discharge under our criminal standards of proof." 413 U.S. at 22.

2. Petitioners contend that the *Roth-Memoirs* test for judging obscenity was "unworkable," in light of the Court's practice, adopted in *Redrup* v. *New York*, 386 U.S. 767, of reviewing obscenity convictions when at least five members of the Court, applying their separate tests, found the material to be protected by the First Amendment. This Court, however, never stated that the *Redrup* approach was necessitated because the *Roth-Memoirs* test was "unworkable."

The Court stated in *Miller, supra*, 413 U.S. at 22, n. 3, that "[i]n the absence of a majority view," the Court began the practice in *Redrup*. This statement can not be interpreted to mean that the *Roth-Memoirs* standards were "unworkable;" they had not been overruled, and therefore, they were still the law and continued to guide lower courts, and people in general, in judging obscenity. Indeed, an analysis of *Redrup* indicates that at least three Justices subscribed to the *Roth-Memoirs'*

standards,[19] two did not believe that obscenity could be constitutionally regulated,[20] and two others followed the original *Roth* formulation absent the "utterly without redeeming social value" test of *Memoirs*.[21] Accordingly, persons whose conduct did not transgress the *Roth-Memoirs* standards could not be constitutionally convicted of violating obscenity laws, since at least five Justices would find their actions constitutionally protected.

II. THE INDICTMENT WAS SUFFICIENTLY DEFINITE

Petitioners argue (Pet. Br. 39–45) that the indictment was insufficient because it failed to inform them of the charges. This argument is simply an extension of petitioners' claim that the terms of the statute are vague and ambiguous; for it is from this that they contend that the indictment, framed in the language of the statute, does not advise them of the offense charged. Since we have shown that the statute is not vague, an indictment drafted in its terms is sufficiently definite.

1. At the time that petitioners were indicted the term "obscene," as used in the statute, had been de

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[19] Chief Justice Warren, Justices Brennan and Fortas adhered to the *Roth-Memoirs* formulation. See *Memoirs* v. *Massachusetts*, 383 U.S. 413, 414.

[20] Justices Black and Douglas believed obscenity was absolutely protected by the First Amendment. See *Ginzburg* v. *United States*, 383 U.S. 463, 476, 482 (dissenting opinions).

[21] Justices Clark and White followed the *Roth* formulation but did not accept the "utterly without redeeming social value" test. See *Memoirs* v. *Massachusetts*, 383 U.S. 413, 441, 461 (dissenting opinions).

fined by this Court in a number of decisions and had a definite meaning. "Obscene" is therefore a legal term of art and not merely a generic or descriptive term. *United States* v. *Thevis,* 484 F. 2d 1149, 1152 (C.A. 5). Accordingly, charging a violation of Section 1461 in the terms of the statute was sufficient. *United States* v. *Thevis, supra*; *United States* v. *Luros,* 243 F. Supp. 160, 166–167 (N. D. *Iowa*), certiorari denied, *sub nom. Luros* v. *Hanson, District Judge,* 382 U.S. 956.

The component elements of "obscene" do not have to be alleged in the indictment because they merely constitute the definition of a legal term. This case is wholly unlike *Russell* v. *United States,* 369 U.S. 749, relied on by petitioners. In *Russell,* the indictment charged in the words of the statute that the defendants refused to answer questions that "were pertinent to the question then under inquiry" by a committee of Congress (*id.* at 753). The Court held the indictment to be insufficient because it did not state the subject which was under inquiry, a question of fact. Here, the allegation that the materials are obscene simply means the materials come within the legal definition of obscenity.

As the court in *United States* v. *Luros, supra,* said, distinguishing *Russell* (243 F. Supp. at 167):

> The definition of obscenity is a question of law rather than fact. Unlike the question under inquiry before the Congressional committee the definition of obscenity does not change with each indictment.

The indictment here, framed in the terms of the statute, charged the mailing of an "obscene, lewd,

lascivious indecent, filthy and vile advertisement' (J.A. 14–31). The indictment was sufficient since i alleged all the elements of the offense and the specifi facts in support thereof, fairly informed petitioner of that which they had to prepare to meet in their de fense, and would enable them to plead an acquittal o a conviction in lieu of future prosecutions for the same offense. *Hagner* v. *United States,* 285 U.S. 427.

2. Petitioners further contend that this Court's re mand in *United States* v. *Orito,* 413 U.S. 139 to the district court for reconsideration of the sufficiency of the indictment in light of *Miller* v. *California,* and *12 200-Ft. Reels of Film* indicates that the sufficiency of the indictment involved here is in question. No such inference can be drawn from the Court's action.

Orito had come to the Court on direct appeal from the district court's summary dismissal of the indictment on the grounds that the statute (18 U.S.C. 1462) was unconstitutional.[22] This Court upheld the statute. Since the district court had not gone beyond the face of the statute in considering the indictment, the only appropriate disposition was to remand to the district court for reconsideration of the sufficiency of the indictment. And since *Miller* and *12 200-Ft. Reels of Film* had incorporated new specificity requirements into the statute, and upheld its constitutionality on those grounds, it would be necessary for the district court to consider the sufficiency of the indictments

[22] The district court held the statute was unconstitutionally overbroad because it did not distinguish between public and non-public transportation of obscene materials.

in light of those cases. On the other hand, in those cases in which obscenity convictions had already been affirmed by the courts of appeals, the Court merely remanded to the courts of appeal for reconsideration, without any indication that the indictments might be vulnerable. (See cases cited in footnote 5, *supra*, p. 20.).

III. THE RULINGS AND INSTRUCTIONS OF THE TRIAL COURT ON THE OBSCENITY ISSUES WERE CORRECT

A. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN EXCLUDING ALLEGEDLY COMPARABLE MATERIALS

In *Smith* v. *California*, 361 U.S. 147, 172, Justices Frankfurter and Harlan observed that a litigant in an obscenity prosecution should be allowed to introduce evidence on the prevailing literary and moral community standards. Justice Frankfurter believed that this should be done with expert testimony, while Justice Harlan would not limit the particular kind of evidence, although he recognized that "it may be considered that expert testimony is the most convenient and practicable method of proof * * *." *Id.* at 172. Recently, in *Kaplan* v. *California*, 413 U.S. 115, 121, the Court reiterated that the prosecution need not produce any ancillary evidence of obscenity, but held that "[t]he defense should be free to introduce appropriate expert testimony."

In the trial of this case, petitioners' right "to enlighten the judgment of the tribunal * * * regarding the prevailing literary and moral community standards * * * through qualified experts" (Justice Frankfurter concurring in *Smith*, *supra*, 361 U.S. 164–165) was

fully permitted. Petitioners' four expert witnesses testified at great length with respect to every aspect of the standards as applied to the materials involved (see *e.g.*, R.T. 3518–4318). Petitioners nevertheless contend (Br. for Pet. Kemp, *et al.* 64–76) that their defense was severely hampered by the trial court's exclusion of three categories of allegedly comparable material: (1) materials which had received second-class mailing privileges, (2) materials which had previously been the subject of litigation and had been found to be "constitutionally protected," and (3) materials openly available on newsstands (R.T. 1963).[23] The trial court rejected these materials because "primarily, they tend to confuse the jury" and because their admission into evidence "would serve no probative value in comparison to the amount of confusion and deluge of material that could result therefrom" (J.A. 158).

The trial court's ruling represented a proper exercise of its duty to assure that the jury is not inundated with a mass of evidence, the relevance and probative value of which is highly questionable, and which is therefore likely to confuse. Moreover, the proffered evidence was largely immaterial and, with respect to the tendered investigation results, constituted an unwarranted invasion into the province of the jury.

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[23] Petitioners also attempted unsuccessfully to introduce into evidence the results of an investigation conducted by a student at San Diego University. The investigation results, derived primarily from responses to a questionnaire, purported to show that a majority of the San Diego residents interviewed believed that the *Illustrated Report* should be read and that the advertisement should be available to the public (R.T. 3923–3938).

1. The availability of similar materials on newsstands is not necessarily relevant to the issues on trial. The availability of such materials indicates only that there is a market for them. Availability in the market place, however, does not demonstrate acceptability by the community. See, *e.g., United States* v. *Manarite,* 448 F. 2d 583 (C.A. 2), certiorari denied, 404 U.S. 947.[24]

Moreover, the defense experts testified at great length with respect to their knowledge of contemporary community standards, concluding that the brochure did not appeal to prurient interests, was not patently offensive and was not without social value. Testimony that similar materials were available—even assuming that it was somehow relevant—would merely have been cumulative. As the court below noted, "One portrayal of female genitalia is quite likely to be comparable to another, * * * and so on." 481 F. 2d at 320. It is far less time consuming, more productive, and less confusing to the jury, if the experts testify only as to the subject materials.

2. Petitioners' offer of a magazine, "Nude Living, No. 63," was properly rejected. The foundation alleged as the basis for its admissibility was that the magazine had received a second-class mailing privilege (J.A. 212–213). The determination whether a publica-

[24] Availability may also point up the difficulties inherent in enforcement of obscenity laws; the consequence of these difficulties may be the availability of obscene materials. It by no means follows that the availability reflects the desires or standards of the community.

tion is entitled to distribution as second class mail, however, is made on the basis of essential objective factors—*i.e.*, that the publication (1) "is regularly issued at stated intervals as frequently as four times a year * * *; (2) is issued from a known office of publication; (3) is formed of printed sheets; (4) is originated and published for the dissemination of information of a public character, or devoted to literature, the science, arts, or a special industry; and (5) has a legitimate list of subscribers." 39 U.S.C. (1964 ed.) 4354; and, see, 39 U.S.C. (1964 ed.) 4351; *et seq;* 39 CFR 132.2. With respect to the fourth statutory requirement, this Court has held that the standard gives postal officials no powers of censorship. *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146. Thus, the fact that a publication has a second class mailing privilege creates no presumption that particular material is not obscene. The trial court therefore acted properly in excluding this evidence.

3. Finally, petitioners urge that they should have been permitted to introduce as comparable materials a film and two magazines which this Court apparently concluded were not obscene. *Pinkus* v. *Pitchess*, 429 F. 2d 416 (C.A. 9), summarily affirmed *sub nom. California* v. *Pinkus*, 400 U.S. 922; *Burgin* v. *California*, 404 U.S. 806 (summary reversal on authority of *Redrup* v. *New York*, 386 U.S. 767). No determination whether the film and the two magazines were truly comparable to the obscene brochure was here made;[23]

[23] In *Pinkus*, the Ninth Circuit observed that the "worst" aspect of the film was the feigned portrayal of self-induced

the trial court excluded all such alleged comparables on the ground that their introduction would confuse the jury and that the probative value was slight. This ruling was proper, since the impact of such evidence upon the jury is the paramount consideration in determining its admissibility.

If the materials are truly comparable, it is more likely that this Court's judgment with respect to them would serve as an imprimatur which would unduly influence the jury's deliberations and cause the litigation to be dominated by ancillary matters. Even if a publication had been found non-obscene at one trial, "a wholly different result might be reached in a different setting" (*Roth, supra,* 354 U.S. at 495, Warren, C.J., concurring). While it may be true that in the line between the obscene and the non-obscene may sometimes be a fine one, it is the jury's to draw in the first instance.[26] A proper respect for that function, as well as the very real possibility that evidence of this

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sexual gratification by a naked female. 429 F. 2d at 417. Here, on the other hand, the "worst" of the obscene photographs portrayed an act of fellatio involving a woman and an animal.

In order to have allegedly comparable materials admitted into evidence, two factors must coalesce: (1) a proper foundation for the admissibility of such evidence, and (2) proof that the proffered material is in fact truly comparable. *Womack* v. *United States*, 294 F. 2d 204 (C.A. D.C.), certiorari denied, 365 U.S. 859; *United States* v. *Jacobs*, 433 F. 2d 932 (C.A. 9).

[26] Where materials alleged to be obscene are fully comparable to materials which this Court has found to be constitutionally protected, the interests of those in petitioners' position are adequately served in this respect by the stringent appellate review characteristic of this area.

Court's pronouncements with respect to comparable materials would confuse the jury, fully supports the trial court's exclusion of the proffered evidence here.[27]

It is the trial court's responsibility to prevent unwarranted interferences. The trial court properly excluded the allegedly comparable material from evidence, because it would tend to confuse the jury (*Books, Inc.* v. *United States*, 358 F. 2d 935 (C.A. 1), reversed on other grounds, 388 U.S. 449, *Burch* v. *Reading Co.*, 140 F. Supp. 136 (E.D. Pa.), affirmed, 240 F. 2d 574 (C.A. 3), certiorari denied, 353 U.S. 965), and was of only minimal probative value. *Womack* v. *United States*, *supra*. The trial court stated that petitioners' proffered "comparable" evidence would "[s]erve no probative value in comparison to the amount of confusion and deluge of material that could result therefrom" (J.A. 158). The admissibility

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[27] There is another, related, consideration which militates against a rule requiring the admission of comparable materials which the courts have concluded are entitled to protection. Given such a rule, trial courts would understandably be reluctant to exclude materials which were arguably comparable. The question of comparability is a particularly delicate one:

"It is one thing to create an integrated work of art containing what would be obscenity standing alone, and another thing to create an integrated work of obscenity, containing excerpts from recognized works of art." (*United States* v. *Ginzburg*, 224 F. Supp. 129, 135–136 (E.D. Pa.), affirmed, 338 F. 2d 12 (C.A. 3), affirmed, 383 U.S. 463.)

Trial courts, under a compulsion to err on the side of caution, could be expected to admit much evidence which would not only confuse the jury and unduly inhibit its proper function, but which would also render comparability itself a major, if not dispositive issue.

of such evidence is within the discretion of the trial court. *United States* v. *Jacobs, supra; Schindler* v. *United States,* 208 F. 2d 289 (C.A. 9), certiorari denied, 347 U.S. 938; *Cotton* v. *United States,* 361 F. 2d 673 (C.A. 8); *Skogen* v. *Dow Chemical Company,* 375 F. 2d 692 (C.A. 8).

Finally, the survey conducted by a student at San Diego State University, of the reactions of people in the San Diego area to the *Illustrated Report* and the brochure, was properly excluded. Cf. *United States* v. *Manarite, supra,* 448 F. 2d at 593. It was the jury's function to evaluate the brochure in terms of the applicable standards, and the survey was, in effect, an attempt to have it evaluated by others, outside the supervision of the court and without the opportunity for cross-examination.

B. THE GOVERNMENT WAS NOT REQUIRED TO PROVE THAT THE DEFENDANTS KNEW THE MATERIALS WERE OBSCENE

Petitioners contend (Br. for Pet. Kemp, *et al.* 18–50) that the crime of mailing obscene materials in violation of 18 U.S.C. 1461, requires proof that the defendant knew the materials were obscene. The statute does not require such proof and it is not constitutionally required. The proper test is whether petitioners were aware of the contents of the materials mailed.

1. The relevant provisions of 18 U.S.C. 1461 provide that, "[w]hoever knowingly uses the mails for the mailing * * * of anything declared by this section * * * to be non-mailable * * *" commits a crime. The term

"knowingly," as a description of the requisite mental element, has appeared in each of the predecessor acts going back to the codification of the postal laws in 1872.[28] While there is no legislative history indicating the nature of the knowledge required, Congress has reenacted this statute numerous times, in essentially the same form, in the face of a decision by this Court (*Rosen* v. *United States*, 161 U.S. 29) and a number of decisions in lower federal courts (see, e.g., *Schindler* v. *United States*, 208 F. 2d 289 (C.A. 9), certiorari denied, 347 U.S. 938; *Knowles* v. *United States*, 170 Fed. 409 (C.A. 8); *Burton* v. *United States*, 142 Fed. 57 (C.A. 8)) that the required knowledge is only of the contents of the materials, and that the defendant's good faith belief in the scientific or social value, or non-obscenity, of the materials is immaterial.[29]

2. The Constitution does not require proof that the defendant was aware that, from the perspective of an average person, the material was obscene under the *Roth-Memoirs* standards (Br. for Pet. Kemp, *et al.* 35, 41). Petitioners challenge the court's instruction

[28] See Act of June 8, 1872, 17 Stat. 283, 302; Act of March 3, 1873, 17 Stat. 598, 599; Act of July 12, 1876, 19 Stat. 90; Act of September 26, 1888, 25 Stat. 496; Act of May 27, 1908, 35 Stat. 416; Act of March 4, 1909, 35 Stat. 1088, 1129; Act of March 4, 1911, 36 Stat. 1327, 1339; Act of June 25, 1948, 62 Stat. 683, 768; Act of June 28, 1955, 69 Stat. 183; Act of August 28, 1958, 72 Stat. 962; Act of January 8, 1971, 84 Stat. 1973, 1974.

[29] Congress has shown its sensitivity to court decisions affecting this statute. The 1958 amendment (72 Stat. 962) changed the terminology to provide for continuing offenses by "use of the mails" instead of by "deposit for mailing," in light of court decisions construing the section as providing for prosecution solely at the place of deposit. See S. Rep. No. 1839, 85th Cong., 2d Sess.

that their "belief as to the obscenity or nonobscenity of the material is irrelevant" (Br. for Pet Kemp, *et al.* 10–14; J.A. 235–236, 259–261).[20] We submit that the

[20] The court charged the jury as follows (J.A. 235–236):

"* * * [T]he crime charged in this case is a serious crime which requires proof of specific intent before the Defendants can be convicted.

"Specific intent, as the term implies, means more than a general intent to commit the act. To establish specific intent, the Government must prove the Defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

* * * * *

"The requirement of knowledge in this case applies * * * to the Defendants' knowledge as to the contents of the envelopes and packages, and that is the intent required. That is to say, it must be proven beyond a reasonable doubt that:

* * * * *

"* * * [T]hey had knowledge of the character of the materials.

* * * * *

"You must be satisfied beyond a reasonable doubt that the Defendants were aware of the character and the nature of the materials alleged to have been mailed * * *.

"The Defendants' belief as to the obscenity or non-obscenity of the material is irrelevant. * * *"

With the exception of an instruction on specific intent, which was in substance incorporated in the court's charge, the various instructions on knowledge proffered by petitioners were refused. Petitioners' position with respect to the knowledge required is reflected in their proposed instruction No. 54, which read in pertinent part:

"* * * [T]he proof must show, beyond a reasonable doubt, that the defendants knew that the material here involved patently offended contemporary standards, and went substantially beyond customary limits of candor; and, in addition, knew that the dominant theme of the material, to the average

trial court's instructions on knowledge were consistent with constitutional requirements.

In *Rosen* v. *United States,* 161 U.S. 29, the question was whether one could be convicted of mailing obscene matter "unless he knew or believed that such [material] could be properly or justly characterized as obscene * * *" (id. at 41). In rejecting this requirement, the Court stated (161 U.S. 41–42):

> The statute is not to be so interpreted. The inquiry under the statute is whether the paper charged to have been obscene * * * was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene * * * was recognized as the test for determining whether the statute has been violated. * * *

In *Smith* v. *California,* 361 U.S. 147, the Court considered a Los Angeles municipal ordinance which

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person applying contemporary standards, taken as a whole, appeals to prurient interest; and, in addition, knew that the material was without ideas and utterly without redeeming social importance" (J.A. 72).

made the mere possession of obscene materials a crime and thus, in effect, provided for strict liability. The statute, in effect, put each bookstore owner under an obligation to make himself aware of the contents of every book in his shop (*id.* at 153). The Court found that this unreasonable demand would become an undue restriction on the public's access to reading matter (*id.* at 153–154). Therefore, consistent with prior law (*id.* at 153, n. 9), the Court held that the ordinance could not constitutionally eliminate the scienter requirement altogether, and that the bookseller must be shown to have "knowledge of the contents of the book" before he can be prosecuted for carrying it in his store (*id.* at 153). The Court refrained, however, from spelling out "what sort of mental element is requisite to a constitutionally permissible prosecution * * *." (*id.* at 154).

In *Manual Enterprises* v. *Day,* 370 U.S. 478, allegedly obscene materials had been declared by the Post Office Department to be non-mailable, under 18 U.S.C. 1461. The ruling of the Post Office was based on alternative determinations that the magazines (1) were themselves "obscene," and (2) contained advertisements for obtaining obscene matter. The Court determined that the magazines were not obscene. In considering whether the magazines were non-mailable because they contained advertisements for obtaining obscene matter, the Court held that proof of knowledge by the magazines' publishers that the publication contained such advertisements was required (*id.* at 492). The Court concluded that the evidence was totally deficient because (*id.* at 494–495):

> [a]t best the Government's proof showed no more than that petitioners were chargeable with knowledge that these advertisers were offering photographs of the same [non-obscene] character, and with the same purposes, as those reflected in their own magazines.

A publisher who has no knowledge that his advertiser is offering obscene materials cannot be held responsible for them. This is all the case stands for, and dicta relied on by petitioners (Br. for Pet. Kemp, *et al.* 30) are not controlling here, where petitioners themselves were engaged in mailing obscene material.

In *Mishkin* v. *New York*, 383 U.S. 502, the Court found that the state's obscenity statute had been interpreted by the state court to require knowledge defined in these terms:

> A reading of the statute as a whole clearly indicates that only those who are in some manner aware of the *character* of the material they attempt to distribute should be punished. It is not innocent but *calculated purveyance* of filth which is exorcised * * * [citing *People* v. *Finkelstein*, 9 N.Y. 2d 342, 344–345, 174 N.E. 2d 470, 471]. [Court's emphasis; *id.* at 510.]

The Court characterized this definition of the knowledge requirement as "stringent" (*id.* at 507, n. 5). Since the statute satisfied the requirement, the Court again found it unnecessary to precisely define "'what sort of mental element is requisite to a constitutionally permissible prosecution'" (*id.* at 511).

Accordingly, while the Court has not directly spoken to the precise issue since *Rosen, supra*, it has not departed from the *Rosen* rationale. Thus, the

decision in *Smith*, focusing as it did upon the requirement that one charged in an obscenity prosecution be aware of the contents of the materials, served to reaffirm the Court's construction of the knowledge requirement announced in *Rosen*.

This Court's decisions indicate that an awareness of the contents of the alleged obscene materials is sufficient to satisfy the Constitutional purposes which underlie the requirement of knowledge. Obscenity is "only material whose indecency is self-demonstrating" *Manual Enterprises* v. *Day*, *supra*, 370 U.S. at 487. As Mr. Justice Frankfurter observed in his concurring opinion in *Smith*, the standard of proof required to show the necessary mental element in obscenity prosecutions is a practicable one (361 U.S. at 164):

> [T]he proof of scienter that is required to make prosecutions for obscenity constitutional cannot be of a nature to nullify for all practical purposes the power of the State to deal with obscenity.

A requirement that the prosecution must prove a defendant's knowledge of the *legal status* of the materials he sells would impose an impossible and unrealistic burden on prosecutions. Obscenity is a legal conclusion which entails the application of appropriate standards from the perspective of an average person in order to determine whether materials, are, beyond a reasonable doubt, obscene. As long as a defendant knows the general character of the materials involved he cannot claim that he was unaware that his conduct might be illegal. There is no reason why

he should also be required to know the materials meet the current judicial standards of obscenity.

Of course, obscenity is sometimes an elusive concept, and persons who have knowledge of the contents and character of the materials may not know with absolute certainty whether the materials will be held legally obscene. Indeed, as Mr. Justice Frankfurter recognized in his concurring opinion in *Smith* v. *California*, 361 U.S. 147, 164, the regulation of obscenity "will carry with it some hazard to the dissemination by a bookseller of non-obscene literature." As Mr. Justice Holmes stated in *United States* v. *Wurzbach*, 280 U.S. 396, 399, however: [21]

> Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familar to the criminal law to make him take the risk. * * *

In sum, the definition of knowledge the district court used in its instructions comported with constitutional requirements. The district court instructed that the crime required specific intent; that the government had to prove petitioners knowingly did an act the law forbids, purposely intending to violate the law; that petitioner had to have knowledge as to the contents of the envelopes and packages; and that they had to

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[21] The cases cited by petitioners (Br. for Pet. Kemp, *et al.* 35–36) all involve statutes requiring a specific knowledge of a fact which is objectively and quantitatively ascertainable.

know the character and nature of the materials (J.A. 235-236). No more was required.[32]

C. THE COURT'S INSTRUCTIONS WITH REGARD TO THE PRURIENT APPEAL OF THE MATERIALS TO SEXUALLY DEVIANT GROUPS WERE PROPER

The government's evidence and the court's instructions were in compliance with the holding in *Mishkin* v. *New York*, 383 U.S. 502, that the prurient appeal requirement must be adjusted "to social realities by permitting the appeal of this type of material [appealing to sexual deviates] to be assessed in terms of the sexual interests of its intended and probable recipient group; * * *" (*id.* at 509).

The government introduced expert testimony that a number of pictures contained in the *Illustrated Report* appealed to the prurient interest of various clearly defined and specified groups, such as homosexuals, group sexual deviants, sadists, masochists, and zoophiliacs (R.T. 1693–1710).[33] The testimony about

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[32] Numerous lower court decisions have upheld a similar test of scienter. See, *e.g.*, *United States* v. *West Coast News Co.*, 357 F. 2d 855, 862 (C.A. 6), reversed on other grounds, *sub nom. Aday* v. *United States*, 388 U.S. 447; *United States* v. *Mishkin*, 317 F. 2d 634, 637 (C.A. 2), certiorari denied, 375 U.S. 827; *Kuhn* v. *United States*, 300 F. 2d 78, 86 (C.A. 5), certiorari denied, 369 U.S. 859; *Schindler* v. *United States*, 208 F. 2d 289 (C.A. 9), certiorari denied, 347 U.S. 938.

[33] This evidence was not at variance with the government's answer to the request for a Bill of Particulars. Petitioners specifically asked whether, "[I]t is claimed that the advertisements * * * appeal to the prurient interest of the average person in the Nation as a whole" (J.A. 36). We answered, "[I]t is implicit in an allegation of obscenity * * * that such advertisements appeal to the prurient interest of the average person" (J.A. 46). The government proof was not at variance

deviant groups concerned certain pictures in the *Illustrated Report*, similar to those in the advertisement, and two of which actually appeared in the advertisement (R.T. 1700, *Illustrated Report*, plate XVII). The trial court properly instructed the jury that, "The materials here involved must be measured by its appeal to the average adult * * * determined by the synthesis of the entire community * * * and not by young persons or those persons highly susceptible thereto" (J.A. 239). The court also stated (J.A. 239-240):

> In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of sexual interest of the intended or probable recipient group. This group must be a clearly defined sexually deviant group.
>
> An example of a group not sufficiently defined would be one labeled as sexually immature. I suppose one clearly defined would be homosexuals.

This instruction properly set forth the *Mishkin* test. But since the *Illustrated Report*, and to a lesser extent, the advertisement, contained a variety of material appealing to a number of prurient interests of various groups (R.T. 1747–1748), the court gave the following cautionary instruction (J.A. 240–241):

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with this answer and the answer did not preclude the introduction of evidence of the material's prurient appeal to sexually deviant groups. At pre-trial, the government made clear its intention to show that the material appealed to the prurient interest of sexually deviant groups (R.T. 29–30, 40–43). As held by the court below, there was no prejudice, in any event, because petitioners' experts were prepared to and did testify at length on the material's lack of prurient interest to sexually deviant groups. 481 F. 2d at 322.

It is not necessary for satisfaction of the prurient appeal requirement that you find one specific type of sexual activity to constitute the dominant theme of the materials under consideration. The prurient appeal requirement is satisfied if you find the dominant theme of the materials to be one of an appeal to an inordinant, shameful, morbid, degrading, unhealthy and unwholesome interest in sex, and details concerning sex, regardless of the type of group to which the appeal is made.

There are depicted throughout the materials under consideration, various sexual activities that may or may not be found to be deviant, that may have prurient appeal, depending upon the particular sexual interest of the viewer, whether normal or deviant.

You need not limit your inquiry to whether the dominant theme of the material appeals to the prurient interest in sex of the average person. You may also consider whether some of the materials involved are designed for a clearly defined deviant sexual group, and whether such material appeals to the prurient interest in sex of the members of that group.

Consequently, if you find that some of the material appeals to the prurient interest of the average person, and some of the material appeals to the prurient interest of a deviant sexual group, that fact would not preclude your finding that the dominant theme of the material taken as a whole is, generally speaking, one of an appeal to the prurient interest, as has been previously defined in the broad sense.

Petitioners contend (Pet. Br. 46–48) that this instruction was erroneous because it allowed the jury to measure the advertisement by its appeal to the pru-

rient interest of the average person and its appeal to the prurient interest of a clearly defined deviant group. The court was not in error in so instructing the jury. The *Illustrated Report* and the advertisement contained materials appealing to the prurient interest of a number of deviant sexual groups, as well as that of the heterosexual person. Accordingly in order to determine whether, as a whole, it appealed to prurient interest, its prurient appeal to all groups had to be considered and measured by the jury (see the government's explanation of this position at trial, R.T. 1741–1745).

Indeed, otherwise, persons could escape the obscenity laws by combining in a single book or advertisement some materials that appeal to heterosexual persons and others that appeal to sexually deviant groups. Neither Congress nor this Court intended such a result. Indeed, this Court in *Miller* apparently interpreted *Mishkin* to contemplate an instruction such as the trial court gave (413 U.S. at 33):

> As the Court made clear in *Mishkin* v. *New York,* 383 U.S. at 508–509, the primary concern with requiring a jury to apply the standard of "the average person, applying contemporary community standards" is to be certain that, *so far as material is not aimed at a deviant group* it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one. * * * [emphasis added].

Thus, material aimed at sexually deviant groups should be measured by its prurient appeal to those groups. In the case at bar, material in one book and

one advertisement was aimed at a variety of sexually deviant groups as well as at heterosexual persons. It was therefore incumbent on the government to introduce evidence and for the court to instruct the jury on the appeal of the book and advertisement to both "normal" persons and sexually deviant groups."[34]

D. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON PANDERING

1. Pandering was not charged in the indictment because it is not an element of the offense; rather, it is evidence which in a close case may tip the balance to show obscenity. *Ginzburg* v. *United States,* 383 U.S. 463, 474; *United States* v. *Palladino,* 475 F. 2d 65, 70-71 (C.A. 1), vacated and remanded in light of *Miller* v. *California,* 413 U.S. 916; *Milky Way Productions, Inc.* v. *Leary,* 305 F. Supp. 288, 294 (S.D. N.Y.) affirmed *per curiam sub nom. New York Feed Co.* v. *Leary,* 397 U.S. 98. The trial court carefully instructed the jury that obscenity was to be determined by the basic (*Memoirs*) test, but that if it found this to be a close case, it could consider pandering to assist

[34] Petitioners also seek to raise an issue neither presented in their petition, nor before the court below. They contend (Pet. Br. 50-52) that the trial court failed to instruct the jury that it must measure prurient appeal by a national standard. Since the issue was not raised in the petition, it is not properly before the Court, and should not be considered. *Irvine* v. *California,* 347 U.S. 128, 129-130; Rule 23(1)(C) of the Supreme Court Rules. In any event, the instruction (J.A. 238) followed the *Memoirs* definition of obscenity word for word. *Memoirs, supra,* 383 U.S. at 418. The district court also explained that, "The average adult is, of course, determined by the synthesis of the entire community, including persons of all sexes, religions, nationalities, creeds, ages, and etc. * * *" (J.A. 239). This was sufficient under *Roth-Memoirs* standards.

in the decision (J.A. 245). Consequently, petitioners were not, as they allege (Pet. Br. 52), convicted of pandering.

2. Contrary to petitioners' contention (Pet. Br. 54-56), Congress did not authorize persons to pander obscene advertisements by enacting 39 U.S.C. 3008.[a] By this statute, Congress simply gave the householder the means to insulate himself from advertisements that offer for sale matter "which the addressee in his sole discretion believes to be erotically arousing or sexually provocative," by instructing the Post Office to order the sender to refrain from mailing any further advertisements to that householder. 39 U.S.C. 3008(a), (b). While Congress left it to the householder to decide whether he wanted to receive "objectional materials," it did not take away the government's right to prevent the dissemination through the mails of obscene materials, including advertisements. In short, Congress did not equate sexually provocative "pandering advertise-

[a] 39 U.S.C. 3008 provides, in pertinent part:

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postal Service to refrain from further mailings of such materials to designated addresses thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postal Service shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees."

ments" with obscene pandering advertisements; and, although the former may be sent through the mails so long as there is no complaint, the latter may not. See 39 U.S.C. 3011(e).

3. The record contains ample evidence of pandering with regard to the advertisements. (The advertisement was adequately described by the court below, see *supra*, pp. 4–5 and is reproduced in the appendix (J.A. 92a).) Its predominant feature is a full page collage of obscene pictures. On the other side of the page the facsimile of the *Illustrated Report* cover emphasized the words "Illustrated Pornography" by setting them off in red and blue letters from the other words printed in black letters. The advertisement is dominated by the obscene pictures, with very little written matter.

The evidence showed that at least 55,000 of these unsolicited advertisements were sent out by a mailing service indiscriminately across the nation to unsuspecting persons, many of whom found the material objectionable (J.A. 124; 101–122). Applicable here is the summary of pandering evidence (with regard to advertisements) in *Miller* v. *United States*, 431 F.2d 655, 658–660 (C.A. 9), vacated and remanded for further consideration in light of *Miller* v. *California*, 413 U.S. 913:

> The volume of circulation of this material, the indiscriminate possible market to which it was disseminated, the character of the enclosures all indicate the type of pandering which was held to support the finding of obscenity in *Ginzburg* * * *.

4. The propriety of the court's pandering instruction is even clearer when it is considered that the advertisement was being evaluated not only as a document charged as obscene in and of itself, but also as an advertisement of the *Illustrated Report*, an obscene book. This is not to suggest, of course, that pandering cannot be relevant with respect to the obscenity of the advertisement iself. As stated in *United States* v. *Pellegrino*, 467 F. 2d 41, 46 (C.A. 9) about an alleged obscene advertisement:

> We cannot say, however, that the question of pandering is wholly irrelevant. Pandering advertising may well forfeit an otherwise available claim of redeeming social value. Further it may cast light on the question whether the dominant theme of the advertising brochure itself is an appeal to a prurient interest in sex.

The pandering instruction was proper in the light of the entire charge and the evidence.

IV. THE JURY CORRECTLY DETERMINED THAT THE BROCHURE WAS OBSCENE

The jury properly found that the advertisement is obscene. This decision was reached only after the jury had examined the materials, heard extensive expert testimony from both sides on the obscenity of the brochure under *Roth-Memoirs* standards, and been carefully and properly instructed by the trial court on those standards. The jury's decision was painstakingly arrived at and obviously discriminating in that it found the brochure obscene but did not reach a deci-

sion on the *Illustrated Report*. This Court recently pointed out in *Miller, supra,* 413 U.S. at 26, that such decisions are properly for the jury:

> In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members. [Footnote omitted.]

Petitioners argue (Pet. Br. 58–61) that because the jury did not reach a decision on the counts dealing with the *Illustrated Report,* it must be presumed to be non-obscene and protected by the First Amendment. From this premise, they conclude that since the brochure fairly advertised the *Report,* the brochure must also be non-obscene.

1. As the court below held, "The premise is false. The jury made no finding on the charged obscenity of the Report." 481 F. 2d at 315. Since no decision was made on the counts involving the *Illustrated Report,* and since there are any number of reasons for the jury's inability to reach a decision, no inference as to the *Report's* obscenity may be drawn.

We need not second-guess the jury as to the grounds on which it distinguished the two items, because it has long been the rule that consistency in the verdict is not required. *Dunn* v. *United States,* 284 U.S. 390; *United States* v. *Carlson and Truax,* No. 73-1519 (C.A. 9, August 27, 1973) (memorandum opinion in obscenity case), petition for certiorari

pending, No. 73–528; *United States* v. *Fiorella*, 468 F. 2d 688, 690 (C.A. 2).

But even assuming *arguendo*, that the jury concluded that the *Illustrated Report* was not obscene material, that conclusion would not automatically cover a separate and distinct brochure advertising the *Illustrated Report*. It is the brochure that was sent out indiscriminately through the mails to unsuspecting persons, and therefore, its obscenity must be judged independently. To claim that the brochure is inseparable from the *Illustrated Report* in determining whether each is obscene is to ignore reality. Obscene advertisements could be readily prepared for works of literature which are plainly non-obscene. Conversely, it would be just as simple to prepare a non-obscene advertisement for an obscene book.

The brochure and the *Illustrated Report* are distinguishable, and different evidence was presented to show each one's obscenity. With regard to social value, the predominant part of the brochure consists of obscene pictures with little else, while the *Illustrated Report* contains the text of the Commission's report as well as a number of pictures (in addition to those in the brochure) which may not be obscene. Thus, the jury could well have found the *Illustrated Report* had some social value while the brochure did not.

Moreover, as Frank Getlein, a government witness properly qualified as an expert on patent offensiveness and social value (R.T. 2341), testified, "the illustrations in the throw away are certainly among the more extreme sexual illustrations to be found in the text" (J.A. 151). Since the obscenity of the material must

be determined on the basis of the material as a whole and not part by part, this concentration of extremely offensive material constituting the predominant part of the brochure could have influenced the jury's decision that the brochure was patently offensive, but the *Illustrated Report* was not. This same reasoning could also apply to the prurient appeal standard, since it too must be measured by examining the material as a whole.

2. The advertisements found non-obscene in *United States* v. *Pellegrino,* 467 F. 2d 41 (C.A. 9) and *United States* v. *Palladino,* 475 F. 2d 65 (C.A. 1), vacated and remanded for further consideration in light of *Miller* v. *California,* 413 U.S. 916, reversed and remanded, No. 72–1005 (C.A. 1, January 7, 1974) are readily distinguishable from the advertisement involved here. As the court noted in *Pellegrino, supra,* 467 F. 2d at 43, n. 4: "The brochure does not contain portrayals of explicit sexual activity between persons." The brochure involved here does. The *Pellegrino* brochure did not even contain the "feast-your-eyes-on" type of pornographic entertainment found obscene by the Ninth Circuit in *Miller* v. *United States,* 431 F. 2d 655.

In *United States* v. *Palladino,* No. 72–1005 (C.A. 1, January 7, 1974), slip op. at p. 4, the First Circuit held on the remand that consistency required it to find the advertisement for "Photographic Deck of Sexual Love" to be non-obscene, because the jury found the actual "Photographic Deck of Sexual Love" to be non-obscene. Initially, we note that the photographs on the playing cards depicted a man and a woman in various sex positions with no explicit sexual activity

displayed. *United States* v. *Palladino*, 475 F. 2d 65, 69 (C.A. 1). The advertisement was only a partial representation of those photographs (*id.* at 71).

Moreover, the court's holding that consistency required its finding that the advertisement was non-obscene was based on its prior finding on independent review of the material that the photographs "consist[ed] simply of sex positions." *Palladino, supra*, 475 F. 2d at 71. Such material is significantly different from the explicit sexual activity portrayed in the brochure involved here. Moreover, unlike the "Photographic Deck of Sexual Love," the *Illustrated Report* was not the basis of any counts on which the jury acquitted the defendants. *Palladino, supra*, 475 F. 2d at 69. Therefore, there is no implicit holding that the *Illustrated Report* was not obscene from which it could be argued that the jury's decision on the brochure was inconsistent.

3. Petitioners argue at length (Pet. Br. 61–66) that their expert witnesses established that the brochure did not appeal to the prurient interest, that it was not patently offensive, and that it had social value. The government's expert witnesses contradicted each pertinent opinion of petitioners' experts.[36] The jury, of course, is not bound to accept the opinion of any expert in weighing the evidence.

Moreover, in light of the Court's recent holding in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56 and

[36] The determination of the expert's competency and qualifications to testify is within the trial court's discretion. *Fineberg* v. *United States*, 393 F. 2d 417, 421 (C.A. 9). No abuse of that discretion has been shown here.

Kaplan v. *California*, 413 U.S. 115, 120–121, expert testimony is not necessary to enable the jury to judge the obscenity of material which has been placed in evidence. The government, however, introduced expert testimony to explain the appeal that some of the material might have to the prurient interest of sexually deviant groups, which the jury might not perceive or understand (R.T. 1694–1718). It thus avoided the possible problems this Court anticipated in *Paris Adult Theatre I, supra*, 413 U.S. at 56, n. 6.[37]

V. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTIONS

Petitioners contend (Br. for Pet. Kemp, *et al.* 51–63) that the evidence was insufficient to support a finding that they were aware of the contents of the advertisement, that they caused it to be mailed, or that they conspired to mail it. The evidence refutes these contentions.

1. The evidence showed that petitioners Reed Enterprises, Inc. and Library Service, Inc. were responsible for mailing the advertising brochures. Reed Enterprises ultimately paid the mailing service which actually placed the brochures in envelopes and affixed the postage (J.A. 122–132, Gov. Exhs. 25, 47, 48). Library Service was identified in the brochure and on

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[37] "We reserve judgment [on the use of expert testimony], however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest."

the return envelope as the party responsible for the mailing (J.A. 92a, Gov. Exhs. 2–13). The four individual petitioners were shown by the corporate documents to have been either officers or board members, or both, of one or both of the corporate petitioners during some or all of the period of time in which the offenses were committed (Gov. Exhs. 30–37a, 84–90). As in *Mishkin* v. *New York*, 383 U.S. 502, 504–505, petitioners "[were] not prosecuted for anything [they] said or believed, but for what [they] did, for [their] dominant role in several enterprises engaged in producing" and distributing obscene materials.

2. Petitioner Hamling played an active role in causing the brochure to be mailed. As president of the corporate entities, he was in control of all their operations. More specifically he signed a Reed Enterprises' check of $4,102.27 (Gov. Exhs. 47, 48) to Regent House in payment for mailing the brochures, and a check of $4,843.14 to London Press for printing the brochures (Gov. Exh. 56). It blinks at reality to argue that petitioner Hamling served as president of the corporations and signed two checks totalling nearly $9,000 to cover costs for distributing the brochures by mail, but was nevertheless ignorant of the contents of the brochures and the fact that they were to be distributed through the mails.

3. Petitioner Kemp was the Vice President and Editorial Director of Greenleaf Classics, Inc., the publisher of the *Illustrated Report* (Gov. Exhs. 19, 21). Greenleaf Classics operated from the same business address as Reed Enterprises and Library Service (J.A. 138). Petitioner was identified at trial by a

postal employee as the individual who signed the Post Office Box rental application for P.O. Box 20308, the box number that appears on page 352 of the *Illustrated Report*, on the advertising brochure, and on the return envelope which accompanied the brochure (J.A. 137–146). The illustrations used in the advertising brochure were taken from illustrations in the *Illustrated Report*.

The nature of the relationship of Greenleaf Classics, in which petitioner served in an executive capacity, to the corporate petitioners, together with petitioner's dominant role as editor of the *Illustrated Report*, from which the illustrations used in the advertising brochure were taken, and his role in assisting with arrangements for the brochures' distribution by mail, support the inferences both that he had knowledge of the contents of the materials and that he helped cause their distribution by mail.

4. Petitioner Thomas, an officer of the corporations involved, signed all but one of the San Diego Municipal Business License Applications for the corporations (Gov. Exh. 41a–e). Additionally, he dealt with a Pitney Bowes employee, James Fernandez, regarding the rental of postage meter no. 901613, and he instructed Fernandez to install the meter at petitioner Library Service, Inc. The meter was used for the mailings of the *Illustrated Report*, the substantive offenses alleged in counts 19 and 21 (J.A. 132–134; Gov. Exhs. 19, 21). Thomas also signed Library Service, Inc., check number 340 for $12,000 for payment on account with Reed Interprises, Inc., Library Service's vendor for the *Illustrated Report* (Gov. Exh. 64).

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While these facts did not constitute direct evidence of Thomas' part in causing the mailing of the brochure, they did show that he was a pivotal corporate figure in Library Service, the party identified on the brochure as responsible for its mailing. Given petitioner Thomas' position as a responsible official of the corporation directly responsible for the mail distribution of the brochure and his involvement in that capacity with transactions related to the distribution of the *Illustrated Report,* the jury was entitled to infer Thomas' knowledge of and participation in the entire transaction related to mail solicitation, including an awareness of the brochure's contents.

5. While the evidence of petitioner Wright's involvement is somewhat more attenuated, it is still sufficient to support her conviction. The evidence was that she was an officer and/or board member of many years' standing in the corporate entities; she is secretary of Reed Enterprises (Gov. Exhs. 35, 39a). Her important role in the corporations' activities is shown by the corporate resolutions authorizing her to travel abroad in the interests of corporate affairs (Gov. Exhs. 30–37a, 84–90). The testimony of a postal employee showed that she personally and actively participated in the affairs of Reed Enterprises at the Camino del Rio South offices of the corporation, where she typed and signed post office box rental applications for the post office boxes used by the corporations in their mail-order business (J.A. 137–146).

Her knowledge of the transactions involving the *Illustrated Report* and, by inference, the brochure, is underscored by a letter from London Press, Inc.,

specifically addressed to her, as representative of Reed Enterprises, confirming shipment of 28,537 copies of the *Illustrated Report* on December 17, 1970, shortly before the brochures here in issue were mailed out (Gov. Exh. 51). Considering Wright's position in the corporate hierarchy and her management of the everyday corporate affairs, as well as her responsibility for the post office boxes rented by the corporation, she can hardly be heard to claim she was unaware of the nature of the advertising brochure mailed or that she had nothing to do with its mailing.

In sum, the evidence warranted the inference that petitioners, as responsible corporate officials in the mail solicitation scheme, were aware of the contents of the brochure. Direct proof showing an actual examination of the brochure is unnecessary. *Smith* v. *California*, 361 U.S. 147, 154. Moreover, one who deliberately "insulates himself against knowledge about * * * offending [material] is [not] thereby free to maintain an emporium for smut" (*id.* at 161; concurring opinion of Mr. Justice Frankfurter).

6. Petitioners' claim that the conspiracy was not proved is equally without merit. It is axiomatic that the existence of an agreement, the gravamen of the conspiracy offense, may be shown by circumstances indicating that petitioners acted in concert to achieve a common goal. *E.g.*, *Blumenthal* v. *United States*, 332 U.S. 539. Here petitioners, all officials of the corporate petitioners, engaged in related transactions which caused the mailing of obscene brochures in order to obtain orders for the *Illustrated Report*. These activities were unquestionably concerted and in furtherance of a common unlawful goal.

VI. THE TRIAL COURT'S OTHER PROCEDURAL RULINGS THAT PETITIONERS CHALLENGE EITHER WERE PROPER OR DID NOT PREJUDICE THEM

A. THE TRIAL COURT'S REFUSAL TO PERMIT PETITIONERS TO OBJECT TO THE INSTRUCTIONS OUT OF THE PRESENCE OF THE JURY DID NOT PREJUDICE THEM

Petitioners contend (Pet. Br. 72–87) that the trial court's denial of their request to object to the instructions out of the presence of the jury in accordance with Rule 30 of the Federal Rules of Criminal Procedure[38] was reversible error. The test of reversible error is not whether there was simply a technical violation of a rule of procedure—as there was here—but whether the accused was prejudiced. Since petitioners were not prejudiced, their convictions should not be reversed.

Rule 30 is patterned after Rule 51 of the Federal Rules of Civil Procedure, although it provides, in addition to objections outside the hearing of the jury, for objecting out of the presence of the jury. The Ad-

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[38] Rule 30, Fed. R. Crim. P., provides as follows:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. *Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury*" (emphasis added).

visory Committee on the Federal Rules of Criminal Procedure declared in the note attending Rule 30:

> This rule corresponds to rule 51 of the Federal Rules of Civil Procedure, the second sentence alone being new. It seemed appropriate that on a point such as instructions to juries there should be no difference in procedure between civil and criminal cases.
>
> * * * * *

The denial of a request under Rule 51 to object to instructions out of the hearing of the jury has been held grounds for reversal only if there is a reasonable basis for concluding that there was resultant prejudice. *Swain* v. *Boeing Airplane Co.*, 337 F. 2d 940, 943 (C.A. 2). In view of the almost identical wording of the two rules,[39] we urge that the similar requirements of Rule 30 also be so construed.

Any other interpretation would be inconsistent with the way in which other provisions of Rule 30 have been interpreted. That rule, for example, also requires that "the court *shall* inform counsel of its proposed

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[39] Rule 51 Fed. P. Civ. P., provides as follows:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

action upon the requests prior to their arguments to the jury * * *" (emphasis added). Yet mere non-compliance with this requirement in the absence of a showing of prejudice, is not grounds for reversal. See *United States* v. *D'Argento*, 373 F. 2d 307 (C.A. 7), certiorari denied *sub nom. Schang* v. *United States*, 389 U.S. 833; *Steinberg* v. *United States*, 162 F. 2d 120 (C.A. 5).

Moreover, the other circuits which have dealt with this question have held that non-compliance with the instant provision of Rule 30 is not reversible error (1) unless the defendant demonstrates that he has been prejudiced, *Sultan* v. *United States*, 249 F. 2d 385, 388 (C.A. 5); *Hodges* v. *United States*, 243 F. 2d 281 (C.A. 5); *United States* v. *Fernandez*, 456 F. 2d 638 (C.A. 2); *United States* v. *Titus*, 221 F. 2d 571, 573-574 (C.A. 2); *United States* v. *Hall*, 200 F. 2d 957 (C.A. 2), or (2) where it appears affirmatively that the defendant was not prejudiced. *United States* v. *Schartner*, 426 F. 2d 470 (C.A. 3); *Lovely* v. *United States*, 169 F. 2d 386, 391 (C.A. 4).[*]

On this record petitioners have made no showing of prejudice, and no conclusion of prejudice can be drawn from the record. The bench conference which

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[*] To the extent that in *Hall* v. *United States*, 378 F. 2d 349, the Tenth Circuit declared that failure to comply with Rule 30 is grounds for automatic reversal, no matter how great the extenuating or mitigating circumstances or how insignificant the prejudice wrought, we believe that decision is erroneous. No other circuit has adopted so severe and uncompromising a rule. See, *e.g.*, *United States* v. *Fernandez*, 456 F. 2d 638 (C.A. 2); *United States* v. *Schartner*, 426 F. 2d 470 (C.A. 3); *Sultan* v. *United States*, 249 F. 2d 385 (C.A. 5); *Lovely* v. *United States*, 169 F. 2d 386 (C.A. 4).

followed petitioners' request to voice objections outside the presence of the jury was one of many such conferences held during the trial. Nothing occurred during that conference from which the jury might have drawn conclusions unfavorable to them.

Indeed, there is no evidence that the jury overheard any of the discussion at the bench conference. Moreover, even if the discussion had been overheard, it is doubtful that petitioners would have suffered any prejudice, since the entire colloquy concerned legal and not factual issues (J.A. 258–265). The court's refusal to excuse the jury was quite understandable in view of the length of the trial, the numerous bench conferences that had already taken place, and defense counsel's statement that he only wished the jury "excused for a few moments" (J.A. 257). In those circumstances, the court could fairly conclude that any objections to its charge could best be dealt with in a summary fashion at a bench conference.

After discussing the issue at length, the court of appeals observed (481 F. 2d at 324):

> In conformity with the settling of instruction conference phase of Rule 30 the District Court and counsel held an extensive and exhaustive conference by way of reviewing the requests and settling the instructions to be given by the District Court and noting counsel's objections thereto.[11]

Indeed, the trial court intended the bench conference only "to be a perfunctory record saving session" (481

[11] As the colloquy at this conference quoted at length in the opinion below (481 F. 2d 324–325) shows, the trial court intended to "incorporate all objections made at this time as though the conference had been held after the instructions were given."

F. 2d at 324). Since there is no showing that the denial of the request prejudiced petitioners, any error committed in denying petitioners' Rule 30 request was harmless. Rule 52(a), Fed. R. Crim. P.

B. THE TRIAL COURT PROPERLY DENIED PETITIONERS' MOTION FOR CONTINUANCE TO ALLOW TIME TO SUPPLEMENT THE JURY WHEEL

Petitioners contend (Pet. Br. 87–94) that the jury was improperly constituted because an allegedly cognizable class of citizens, "young adults," which they define as those between the ages of 18 and 24, were systematically excluded,[42] and that in such circumstances it was an abuse of discretion for the trial court to refuse to grant a continuance until a new jury, presumably containing a larger portion of "young people," was drawn.

1. The jury selection plan of the Southern District of California, consistent with 28 U.S.C. 1863(b)(2) and 1863(b)(4), provides for periodic emptying and refilling of the master jury wheel from voter registration lists, "the interval for which shall not exceed four years."[43] This procedure accomplishes the important objective of securing a fair cross-section of the

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[42] In fact, as the court of appeals noted: "there were a few persons on the venire of that age [24 years old]" (481 F. 2d at 313).

[43] At the time of petitioners' indictment and trial, the Plan provided for emptying and refilling of the master jury wheel every four years and it was slightly less than four years since it had last been filled. Congress has subsequently amended 28 U.S.C. 1863(b)(4) to provide that the master jury wheel must be emptied and refilled by September 1, 1973, and no less often than every four years thereafter. Pub. L. No. 92-269, 86 Stat. 117 (April 6, 1972).

community in the jury wheel while at the same time accommodating the practical problems of judicial administration.

Because the wheel is emptied and filled periodically, persons added to the voter registration lists after refilling cannot be placed in the master wheel until it is again refilled. Since each time the jury wheel is refilled, new young voters are added, the periodic delays occasioned by problems of administration do not amount to discriminatory exclusion.[*] There was, in short, no evidence of "purposeful discrimination" in this case. *Whitus* v. *Georgia,* 385 U.S. 545, 551.

Moreover, there is no requirement that a jury be a statistical mirror of the community, *United States* v. *DiTommaso,* 405 F. 2d 385, 389 (C.A. 4), or conform to the proportionate strength of each identifiable group in the total population, *Simmons* v. *United States,* 406 F. 2d 456, 461 (C.A. 5); it is only required that there be no discriminatory exclusion. See *Alexander* v. *Louisiana,* 405 U.S. 625. The under-representation of the young in the jury pool has been repeatedly sustained in view of their mobility and commitments to education and military service. See *United States* v. *Gast,* 457 F .2d 141 (C.A. 7); *United States* v. *Camara,* 451 F. 2d 1122 (C.A. 1); *United States* v. *Butera,* 420 F. 2d 564 (C.A. 1). This is, of course, particularly true of young people, ages 18 to 24, who comprise the over-

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[*] The courts have upheld jury plans that have not been updated for three years, *United States* v. *Pentado,* 463 F. 2d 355 (C.A. 5); three years, four months, *United States* v. *Gooding,* 473 F. 2d 425 (C.A. 5), and five years, *United States* v. *Kuhn,* 441 F. 2d 179 (C.A. 5).

whelming majority of college and draft-age persons.

2. Petitioners have also failed to establish that "young adults" are a distinct group. *Cf., Hernandez* v. *Texas,* 347 U.S. 475. The "young" share no common characteristic except chronological age.[45] *United States* v. *Gargan,* 314 F. Supp. 414 (W.D. Wis.). In *United States* v. *Butera, supra,* where young adults were held to comprise a distinct group, the court defined "young" as including persons, between 21 and 35, not 18 to 24.[46] Moreover, there is nothing identifiable or distinctive about young persons, between 18 and 25, to set them apart from young persons, over 25, who were eligible for jury duty here. See *United States* v. *Gooding,* 473 F. 2d 425, 430 (C.A. 5), citing *United States* v. *Kuhn,* 441 F. 2d 179, 181 (C.A. 5).

3. Since petitioners failed to support their claim that the jury was improperly constituted, the trial court acted within its discretion in denying petitioners' motion for a continuance. See *United States* v. *Spoonhunter,* 476 F. 2d 1050 (C.A. 10); *United States* v. *Rosenthal,* 470 F. 2d 837 (C.A. 2).

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[45] Petitioners themselves contend that the most important factor in determining a person's views on pornography is not age but religious upbringing (Pet. Br. 94).

[46] In *United States* v. *Kuhn,* 441 F. 2d 179 (C.A. 5), the Fifth Circuit rejected the notion that persons between 21 and 23, constituted a distinct group for jury selection purposes.

C. THE TRIAL COURT PROPERLY CONDUCTED THE JURY *VOIR-DIRE* ON QUESTIONS CONCERNING SEX AND OBSCENITY

The manner in which voir dire of the jury is conducted is within the discretion of the trial court, whose rulings will not be disturbed on appeal unless the court clearly abused its discretion. *United States* v. *Linn*, 438 F. 2d 456 (C.A. 10); *Haslam* v. *United States*, 431 F. 2d 362 (C.A. 9), certiorari denied, 402 U.S. 976; *Tillman* v. *United States*, 406 F. 2d 930 (C.A. 5). No abuse of discretion took place here.

As Rule 24(a) of the Federal Rules of Criminal Procedure permits, the trial court itself conducted the *voir dire* examination using additional questions submitted by counsel. The court of appeals held that the *voir dire* examination was "full, complete and imminently [*sic*] fair" to petitioners (481 F. 2d at 314). Of the 130 separate questions submitted by petitioners, many of which were composed of multiple sub-questions, the district court asked "many of the questions as submitted, many in altered and consolidated form, and declined to ask many others which were cumulative and argumentative" (481 F. 2d at 314).[47]

The court's refusal to ask cumulative, argumentative or tangential questions was proper and certainly did

[47] The court did ask questions of prospective jurors intended to expose any prejudices involving "obscenity" or related matters (R.T. 248–250, 253–257, 261–262).

not constitute an abuse of discretion. *United States* v. *DePugh*, 452 F. 2d 915 (C.A. 10), certiorari denied, 407 U.S. 920. Moreover, since the voir dire examination was sufficient to test the qualifications and competency of the prospective jurors, the restrictions placed by the court on the examination were not an abuse of discretion simply because the examination might possibly have been more searching; that is always a possibility, *Kreuter* v. *United States*, 376 F. 2d 654 (C.A. 10), certiorari denied, 390 U.S. 1015.

Petitioners' reliance on *Aldridge* v. *United States*, 283 U.S. 308 and *Ham* v. *South Carolina*, 409 U.S. 524 is misplaced. These cases established the right to explore on voir dire examination the racial biases of prospective white jurors when a black defendant is involved. In the instant case, however, the purpose of petitioners' proposed questions was not to uncover racial bias or even religious prejudice, but to probe the religious upbringing of the jurors and its resultant effect on their views on obscenity.

Though "pornography" is a controversial issue, that alone does not justify the sweeping inquiry petitioners wanted. See *Ham* v. *South Carolina*, *supra*; *United States* v. *Owens*, 415 F. 2d 1308 (C.A. 6), certiorari denied, 397 U.S. 997; *United States* v. *Clancy*, 276 F. 2d 617 (C.A. 7), reversed on other grounds, 365 U.S. 312. *Ham* v. *South Carolina*, *supra*, is instructive. Though this Court in *Ham* held that the trial court's refusal to inquire into the racial bias of prospective white jurors against a black defendant was reversible error, it rejected a similar contention concerning the

trial court's failure to inquire into a potential bias against beards. It did so because the trial court had asked a general question about bias and this Court was unable "to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudicies * * *" (409 U.S. at 528). Here the trial court did ask questions about attitudes toward obscenity, but properly found the questions about religion (Pet. Br. 94) too tangential to the issues on trial.

At all events, as the court below concluded in the particular circumstances, the voir dire was completely fair and the assignment of error "is without merit" (481 F. 2d at 314).

VII. THE GRAND JURY WAS NOT PREJUDICED AGAINST PETITIONERS

Petitioners contend (Pet. Br. 99–101) that the action of government counsel before the Grand Jury prejudiced that body. As the court of appeals below held in rejecting that contention (481 F. 2d at 313):

> The record before us is totally lacking of any evidence or showing of any kind that any member of the Grand Jury was biased or prejudiced in any degree against any of the appellants, except only a supposition as to how the members have reacted upon a view of the Brochure and Report.

Contrary to petitioners' assertion, this language does not constitute an acknowledgment by the court below, by supposition or otherwise, that "the Grand Jury may have been 'biased or prejudiced' against petitioners 'upon reviewing the Brochure and Re-

port'" (Pet. Br. 99). The court's statement was obviously intended as a complete rejection of petitioners' challenge to the Grand Jury proceedings.[48]

Petitioners have failed to adduce any evidence of prejudice. Their unsupported allegations do not overcome the presumption of regularity which attends Grand Jury proceedings. *Vuckson* v. *United States*, 354 F. 2d 918, 921 (C.A. 9), certiorari denied, 384 U.S. 991; *Blumenfield* v. *United States*, 284 F. 2d 46 (C.A. 8), certiorari denied, 365 U.S. 812; *United States* v. *Nunan*, 236 F. 2d 576 (C.A. 2), certiorari denied, 353 U.S. 912.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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APRIL 1974.

[48] Petitioners' reliance on *United States* v. *Whitted*, 325 F. Supp. 520 (D. Neb.) and *United States* v. *DiGrazia*, 213 F. Supp. 232 (E.D. Ill.), is misplaced. The decisions in those cases rested on the impossibility of determining whether evidence or prejudice prompted the Grand Jury's actions. The language of the court of appeals quoted above leaves no room for doubt that the instant indictment rested on evidence alone.

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-507

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID THOMAS, and LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Reply Brief of Petitioners William L. Hamling, Reed Enterprises, Inc. and Library Service, Inc.

Preliminary Statement.

Petitioners received the Government's 78-page Brief on April 8, 1974, one week before argument.

The Government states, erroneously, that petitioners engaged in "a scheme" to distribute a book entitled *The Illustrated Presidential Report of the Commission on Obscenity and Pornography* [Govt. Br. 4]. There was no scheme. Petitioners openly advertised and sold the book with the publisher's name and address prominently displayed. The book contained *all* of the text of

the *Report of the Commission on Obscenity and Pornography* and numerous photographs which the Government stipulated were the same type of pictorial material used in connection with the Commission's work [J.A. 163-166]. *The Illustrated Report* was developed around the public domain work, the *Report of the Commission on Obscenity and Pornography*, an official Government document printed by the United States Government Printing Office. The official *Commission Report* unquestionably has serious political and scientific value. Dr. Otto N. Larsen, one of the Commissioners and Chairman of the Effects Panel of the Commission, testified that *The Illustrated Commission Report*, with its pictures, was more valuable than the official *Commission Report*, without illustrations [R.T. 4229-4230, 4237, 4240-4242, 4257-4258, 4263, 4266, 4270, 4272, 4285-4286]. Dr. W. Cody Wilson, the Executive Director and Director of Research of the Commission, also testified that *The Illustrated Report*, with its pictures, was more valuable than the official *Commission Report* [R.T. 3354].

The brochure, found obscene by the jury, fairly and accurately advertises the book. It advises the reader, accurately, that the book contains the complete text of the official *Commission Report*, and that the pictures contained therein could have been used as part of the studies made by the Commission. The brochure emphasizes the political and scientific value of the book it advertises.

Inexplicably, the Government suggests that petitioners called only one witness (Professor Swain) on the issue of the social value of the brochure [Govt. Br. 10]. The Court of Appeals correctly observed that four of petitioner's experts "testified that in their opinion the

Brochure had redeeming social value and was not obscene" (481 F.2d at 311) [See, Br. for Pets. Hamling, *et al.*, 11, 62-65].

The Government recognizes that petitioners have been caught in a period of transition, their prosecution having taken place before *Miller* was decided. To find a solution to the dilemma thus created, the Government looks to *United States v. Palladino*, ...F.2d.... (No. 72-1005, 1 Cir. 1974), where the Court said: ". . . [W]ith due regard for First Amendment rights we adopt the position that . . . the material allegedly in violation of 18 U.S.C. §1461 must be found to be obscene under both the *Miller* and *Roth-Memoirs* standards or the defendants must be acquitted." (Slip Op. 2-3).

Whatever view this Court may take with regard to the constitutionality of §1461 as applied to petitioners' pre-June 21, 1973 conduct, it seems plain that the Indictment herein must be dismissed since it plainly does not allege that the brochure was obscene under both the *Miller* and the *Roth-Memoirs* standards. See, *United States v. Fiorito*, 465 F.2d 431, 432 (7 Cir. 1972).

ARGUMENT.

I

The Provisions of Title 18 United States Code §1461, on Their Face and as Construed and Applied to Petitioners' Pre-June 21, 1973 Conduct, Violated the Guarantees of the First and Fifth Amendments to the United States Constitution, Because They Failed to Provide "Fair Notice" or "Concrete Guidelines" as to What Sexual Expression Was Prohibited by the Provisions of the Statute.

A. Prior to June 21, 1973, §1461 Was Unconstitutionally Vague, Because It Failed to Contain a Description of the Conduct Miller Held Was Constitutionally Mandated and the Statute Had Not Received a Prior Authoritative Construction Reading the Necessary Terminology Into the Statute.

In *Miller*, the Court said that under "the holdings announced today no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating . . . law as written or construed." (413 U.S. at 27). In *United States v. Palladino*, ... F.2d .... (No. 72-1005, 1 Cir. 1974), the court stated that §1461 "does not contain the specifics" *Miller* requires (Slip Op. 3). In *United States v. Thevis*, 484 F.2d 1149 (9 Cir. 1973), cert. pending, No. 73-1091, the court said: "On its face, this statutory terminology ['obscene, lewd, lascivious or filthy'] does not contain the specifics required by *Miller* . . . . *Miller* requires that elements of the definition be a part of the statute." (484 F.2d at 1155).

In spite of all this, the Government asserts that "there is no basis for concluding that 18 U.S.C. 1461 was void on its face before *Miller* was decided." [Govt. Br. 22].

The fact is that §1461 is facially defective. That however does not, of course, answer all questions. As the Government correctly points out [Govt. Br. 20], *Miller* was not a holding that *all* obscenity statutes were unconstitutional."Existing statutes, as construed heretofore or hereafter, may be adequate." (*Miller*, 413 U.S. at 24, n. 6).

The Government argues, weakly, that "heretofore" §1461 had received a saving authoritative construction reading into the Section the requisite "specific sexual conduct".[1] The "specific conduct", according to the Government, "was derived from those materials judicially found to be obscene (or nonobscene) in past cases" [Govt. Br. 22]. Reliance was placed upon Justice Stewart's dissenting opinion in *Ginzburg v. United States*, 383 U.S.463, 499, n. 3; Justice Stewart's concurring opinion in *Jacobellis v. Ohio*, 378 U.S.184, 194; and *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 489-490. Neither Justice Stewart's dissenting opinion in *Ginzburg* nor his concurring opinion in *Jacobellis* qualifies as an authoritative construction of the statute. In *Jacobellis*, Justice Stewart observed that it is possible to read the Court's opinion in *Roth* in a variety of ways. He then observed that the Court was there faced "with the task of trying to define what may be indefinable". (378 U.S. at 197). Justice Stewart concluded that it was not likely that he could ever succeed in intelligently defining the kinds of material embraced within the concept of hard core pornography.

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[1]See, Br. for Pets. Hamling, *et al.*, 24 n. 4. See also, *Blount v. Rizzi*, 400 U.S.410, 419.

The Government points to some old cases cited in *Jacobellis* by Justice Stewart (378 U.S.184, 197, n. 1), but they hardly afford "fair notice" or "concrete guidelines" as to what is obscene under the statute. The Government's reliance on *Manual Enterprises, Inc. v. Day, supra,* is equally futile. In *Manual,* Justice Harlan, speaking for himself and Justice Stewart, said: "Whether 'hard-core' pornography, or something less, be the proper test, we need go no further in the present case than to hold that the magazines in question . . . cannot, under any permissible constitutional standard, be deemed to be beyond the pale of contemporary notions of rudimentary decency. . . . Our own independent examination of the magazines leads us to conclude that the most that can be said of them is that they are dismally unpleasant, uncouth and tawdry. . . . Of course not every portrayal of male or female nudity is obscene. . . ." (370 U.S. at 194).

It thus appears that §1461 is facially defective and that prior to June 21, 1973 no prior saving construction had been placed on the statute. Nevertheless, the Government argues that "petitioners are in no position to complain, because the statute was clearly constitutional as applied to them" [Govt. Br. 22]. This approach is at war with the statement made in *Miller* that no one will be subject to prosecution unless they are prosecuted pursuant to a valid statute containing "fair notice" and "concrete guidelines". See also, *Thornhill v. Alabama,* 310 U.S.88. Moreover, since petitioners presented weighty evidence that the brochure is not obscene, there is simply no basis for the Government's contention that the statute was "clearly" constitutional as applied to petitioners. The Government's own witness, Mr. Getlein, testified that a photo-

graph of a female touching the genitalia of a male and a picture of fellatio could be within community standards [J.A. 152-153].

Additionally, it should be remembered that under the "utterly without redeeming social value" test, it was virtually impossible for the Government to obtain a constitutionally valid conviction under §1461 [See, Govt. Br. 19-20, 32, 33]. Finally, at the time the brochure was mailed, this Court was deciding cases under the "subjective" *Redrup* test. Under that subjective test, which prevailed at the time of trial, it is certain that if Justice Black[2] were still sitting five members of the Court would find for petitioners [See, Govt. Br. 34].

B. Prior to June 21, 1973, §1461 Was Unconstitutionally Vague, Because the Statute Was Authoritatively Construed as Requiring Proof That Charged Publications Offend National Standards, Which Nationwide Standards This Court Found Were Unascertainable, Unprovable and Nonexistent.

The Government expresses a preference for utilizing local standards in federal obscenity cases [Govt. Br. 26]. Relying on *United States v. Groner*, 479 F.2d 577 (5 Cir. 1973), the Government argues that "the jurors in federal obscenity cases should be permitted to draw on those standards with which they are familiar, and not apply standards . . . about which the jurors may know very little" [Govt. Br. 28-29]. In *Groner*, the court also said: "It does not seem reasonable or sensible to require a jury in federal criminal obscenity cases drawn from a single district or division to assess the thinking of the average person in

[2]Justice Black of course was a member of the Court when the brochure was mailed.

the community, to consider the common conscience of the community, or the present-day standards of the community if the word 'community' is to include all of the people within the boundaries of this vast nation North, South, East and West." (479 F.2d at 583).

In *Miller*, this Court stated that our Nation is too big and too diverse for the Court to be able to articulate a single formulation of national standards, "even assuming the prerequisite consensus exists. To structure an obscenity prosecution around evidence of national community standards would be an exercise in futility". (413 U.S. at 30). The Court asserted that national standards were "unascertainable" (413 U.S. at 31-32). The Court cited with approval Chief Justice Warren's observation in *Jacobellis v. Ohio*, 378 U.S.184, 200, that "there is no provable 'national standard' . . . . [I]n all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."

Ignoring the fact that the jury could not determine whether the brochure offended national standards because such standards are not ascertainable, the Government asserts that there is "no reason to assume that juries in pre-*Miller* cases could not and did not determine a workable national standard" [Govt. Br. 29]. Juries, we are told, "are always guided by their perception of their community's values" and "the instructions to apply 'national standards' do not markedly change that perception." [Govt. Br. 30-31]. The Government here seems to suggest that the instructions

given to the jury in obscenity cases are, for all practical purposes, meaningless and that juries decide such cases by intuition, or bias.

Alternatively, the Government argues that if petitioners should have been tried under local standards it is "highly unlikely that the petitioners could have been prejudiced by the application of a national standard. . . . Petitioners could have benefited from the application of a local standard only on the unlikely hypothesis that jurors would have found their own community more permissive than the nation as a whole." [Govt. Br. 30]. *United States v. Friedman,* 448 F.2d 1141 (10 Cir. 1973), is the answer to this contention. "We are not prepared to hold or assume that in all instances the national standards are more lenient than all local standards. Further there are substantial unresolved questions as to the nature of the proof now required. . . . A consideration of the application of national or local standards should be initially made by the trial court in addition to the determination of what such standards may be." (488 F.2d at 1141-1142).

Moreover, the trial court herein excluded a survey and evidence of petitioners' witness, Virginia Carlson, establishing that a substantial majority of the 718 persons she interviewed in the San Diego area stated that the brochure in issue should be available to the public in general [R.T. 3922. See, Br. for Pets. Kemp, *et al.*, 68-69]. In excluding the evidence, the court stated that "the community standards we are concerned with here are the national standards. . . . How does this witness

bear at all on the national community standards?" [R.T. 3931]. At the close of the case when instructions were being discussed, government counsel observed that there was a typographical error using the word "county" instead of "country". Government counsel then stated: "If it was the county, perhaps Miss Jenny Carlson might have been a competent witness after all. But, of course, that is not the test." [R.T. 4492].

Finally, the Government argues that it does not matter what standards are applied since the brochure "is obscene under any standard" [Govt. Br. 31]. On the contrary, the brochure is constitutionally protected under *Miller*, *Memoirs* and *Redrup*. In *Miller*, the Court, quoting from *Roth*, said: "The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people." (413 U.S. at 350). (Emphasis added.) *The Illustrated Report* had as one of its goals the bringing about of political and social changes with regard to the right of willing adults to view sexually explicit material. The brochure emphasized this aspect of the book, and is not obscene.

C. Prior to June 21, 1973, the Statute Was Authoritatively Construed as Requiring Proof That Charged Publications Appeal to the Prurient Interest of the Average Person in the Nation as a Whole, Which Test This Court Labeled "Unrealistic".

The Government did not address itself to the question of whether national or local standards must be used in determining the issue of "prurient interest".

In *Miller*, the Court stated that under *Memoirs* a *national standard* of First Amendment protection had to be used in determining what appeals to "prurient

interest". (413 U.S. at 30-31). In the case at bar, national standards were *not* utilized on the issue of "prurience". Before trial, petitioners filed a Motion for a Bill of Particulars asking the Government to state whether it claimed that the advertisements "appealed to the prurient interest of the average person, in the Nation as a whole" [J.A. 36]. The Government's response was that it claimed that the advertisements "appealed to the prurient interest of the average person" but that "there is no requirement to show prurient interest of the average person 'in the nation as a whole'. The 'nation as a whole' requirement applies only to the issue of 'contemporary community standards.' " [J.A. 46]. The trial court never advised the jury by what standards it was to measure the "prurient appeal" of the brochure [Br. for Pets. Hamling, *et al.*, 50-52]. The jury was thus called upon to determine the issue of "prurience" abstractly, without reference to either a national or local standard. The statute, so construed, is unconstitutionally vague.

D. Prior to June 21, 1973, §1461 Was Unconstitutionally Vague Because It Utilized an Unworkable and Ambiguous Test—the "Utterly Without Redeeming Social Value" Test.

The Government argues that this Court rejected the "utterly without redeeming social value" test because it deprived the Government of the opportunity of obtaining "constitutionally valid convictions by imposing an 'impossible' standard of proof", rather than because the test was "unworkable and ambiguous" [Govt. Br. 19-20]. The Government's argument is that this Court found the "utterly without redeeming social value" test so all-encompassing that it effectively nullified the

statute. Whether the Court accepts the petitioners' interpretation or the Government's, the result is the same. Utilizing the "social value" test, it was impossible for a reasonable person to determine with reasonable certainty what was, and what was not, covered by §1461.

E. Prior to June 21, 1973, §1461 Was so Vague, Ambiguous and Unworkable That This Court Was Required to Adopt the Redrup Approach of Deciding Each Case on an Ad Hoc Basis, Without Attempting to Offer Guidance to Those Subject to the Provisions of the Statute.

The Government argues that this Court "never stated that the *Redrup* approach was necessitated because the *Roth-Memoirs* test was 'unworkable' " [Govt. Br. 33]. With all respect, a reading of Chief Justice Burger's opinion in *Miller* (413 U.S.22, n. 3) and Justice Brennan's dissenting opinion in *Paris* (413 U.S. at 82) makes it abundantly plain that the unsatisfactory *Redrup* approach was utilized because there was no other formula available to the Court. When petitioners allegedly mailed the brochure at issue, *Redrup* was the operative test for determining whether a publication was constitutionally protected or obscene. Concededly, *Redrup* failed to afford citizens "fair notice" or "concrete guidelines" as to what publications dealing with sex would be found obscene by five of the then sitting Justices, "subjectively judging" the publications, "applying their separate tests".

II

In Light of This Court's June 21, 1973 Rulings, the Indictment Herein Is Fatally Defective Because It Failed to Inform Petitioners of the Nature and Cause of the Accusations Against Them in Violation of the Provisions of the Sixth Amendment.

In *United States v. Orito*, 413 U.S.139, 145, this Court vacated the judgment of the District Court and remanded the case for reconsideration of the sufficiency of the indictment. The Government recognizes, as it must, that "since *Miller* and *12 200-Ft. Reels of Film* had *incorporated new specificity requirements into the statute* . . . it would be *necessary* for the District Court to *consider the sufficiency of the Indictment* in light of those cases." [Govt. Br. 36-37]. (Emphasis added.)

The Government apparently recognizes that if §1461 is defective on its face the Indictment, which repeats its words, would be similarly defective. Accordingly, the Government argues—in plain conflict with *Miller*—that the words "obscene, lewd, lascivious, indecent, filthy and vile", standing by themselves, afford the requisite "fair notice" and "concrete guidelines" required by the Constitution.

Moreover, the Government argues that the statutory words "obscene, lewd, lascivious, indecent, filthy or vile" had been defined by this Court in a number of cases "and had a definite meaning". Accordingly, the Government argues, "charging a violation of §1461 in the terms of the statute was sufficient" [Govt. Br. 34-35]. It is of course true that this Court has attempted to define the term "obscene" in a number of decisions, but it is decidedly not true that that term had, prior to June 21, 1973, "a definite meaning". On the contrary, this Court's early efforts at defining this "legal term of art" has

been tortured. Every member of the Court agrees that at least prior to *Miller* the attempt to identify "obscenity" was unsatisfactory.

The confusion surrounding the term "obscenity" was explored in *United States v. Groner*, both by the panel (475 F.2d 550 [5 Cir. 1972]) and by the court en banc (479 F.2d 577 [5 Cir. 1973]). Judge Gewin, speaking for the majority of the en banc court, stated that the familiar *Roth-Memoirs* test "represents an amalgam of the individual views of members and former members of the Court, taken from their respective concurring or dissenting opinions in *Roth* and subsequent decisions involving obscenity." (479 F.2d at 580). He concluded that the *Roth-Memoirs* test "is not the prevailing test" (479 F.2d at 580). In overruling the panel's decision in *Groner*, Judge Gewin stated: "[I]t is apparent that the panel opinion was decided on an erroneous view of the test to be applied in determining obscenity. Neither the 'patent offensive' nor the 'utterly without redeeming social value' elements are included in the test laid down by the Supreme Court, nor is the community national in scope." (479 F.2d at 583). Judge Ainsworth asserted that "accurate guidelines . . . based on past decisions of the Supreme Court, are hard to find." (479 F.2d at 586).

It thus appears that as late as May 1973—when *Groner* was decided—there was virtually total disagreement as to the definition of "obscenity" under the federal statute. Prestigious courts disagreed on the following issues:

(1) Whether the "utterly without redeeming social value" test was applicable;

(2) Whether the "patently offensive" test was applicable;

(3) Whether national or local standards were to be used in measuring "patent offensiveness";

(4) Whether national or local standards were to be used in determining appeal to prurient interest;

(5) Whether "pandering" could be utilized if it was not charged in the Indictment;

(6) Whether the "prurient interest" could be measured by a clearly defined sexually deviant group if the Indictment made no such charge;

(7) Whether, under §1461, the burden was on the prosecution to plead and prove that an accused knew the charged material was obscene

The Government asserts that "the allegation that the materials are obscene simply means the materials come within the legal definition of obscenity" [Govt. Br. 35]. This merely begs the issue since the question remains, what was "the legal definition of obscenity" prior to June 21, 1973? When, therefore, the Government asserts that the term "obscene" was "a legal term of art", the Government must be referring to abstract art.

The Government briefly brushes aside *Russell v. United States,* 369 U.S.749, without any real attempt to deal with its relevance to the case at bar [See, Br. for Pets. Hamling, *et al.,* 40-44]. The Government totally fails to discuss the other cases cited by petitioners dealing with the insufficiency of the Indictment. In *United States v. Vuitch,* 402 U.S.62, the Court stated that under the abortion statute there involved "the burden is on the prosecution to plead . . . that an abortion was not 'necessary for the preservation of the mother's life or health' " (402 U.S. at 71). In *Rabe v. Washington,* 405 U.S.313, 317, Chief Justice Burger, joined by Jus-

tice Rehnquist, said that while, in their opinion, the conduct there involved was punishable, the "charge did not give the notice constitutionally required."

In *United States v. Fiorito*, 465 F.2d 431 (7 Cir. 1972), an indictment brought under Title 18 U.S.C. App. §1202(a) was dismissed because it failed to contain the elements of the offense as the same was set forth by this Court in *United States v. Bass*, 404 U.S. 336. In *Fiorito*, the Government conceded and the court found "that the indictment is fatally defective in that it merely charges that appellant, who had previously been convicted of a felony, possessed firearms, with no allegations of any nexus with interstate commerce." (465 F.2d at 431). The court said: "After the conviction which is the subject of this appeal, the United States Supreme Court construed this statute and . . . held . . . that the possession of a firearm 'in commerce or affecting commerce' is an element of the offense. . . . As the indictment fails to state an offense, it must be dismissed." (465 F.2d at 432).

In *United States v. Beard*, 414 F.2d 1014 (3 Cir. 1969), the court dismissed an indictment because it did not allege the essential element or "unlawful or fraudulent intent". At trial, the judge included in his charge a reading of the statute in question and further instructed the jury that an essential element of the crime is action "with an unlawful or fraudulent intent". The court rejected the Government's contention that under the circumstances the failure to allege in the indictment the prescribed intent is a technical deficiency which did

not prejudice the accused. Quoting from *United States v. Manuszak*, 234 F.2d 421, 423 (3 Cir. 1956), the court said:

> ". . . [T]he count is a nullity as a charge of a federal crime and should be quashed. The defect is not one of form which will be overlooked after a verdict when no prejudice is shown. Although after a verdict every intendment should be indulged in support of the count, neither the verdict nor the evidence supporting the verdict can be used as a basis for dispensing with the rule that the indictment must state all the essential ingredients of the crime." (414 F.2d at 1015).

See also, *Smith v. United States*, 360 U.S.1, 9.

III

The Provisions of Title 18 United States Code §1461, on Their Face and as Construed and Applied to Authorize the Jury to Measure the Prurient Appeal of the Brochure by Its Impact on Undefined Sexually Deviant Groups Rather Than Solely by Its Impact on the Average Person in the Nation as a Whole, Violated the Free Speech and Press Provisions of the First Amendment and the Due Process Provisions of the Fifth Amendment.

Petitioners have been met at every stage in the criminal proceeding with a different theory as to whether the brochure was to be measured by its impact on the average person or its impact on some undefined sexually deviant group. The Court of Appeals recognized that Petitioners "were charged with dealing in obscene materials which appealed to the prurient interest of the *average person*. The Government so stated in its

pretrial answer to the appellant's request for particulars." (481 F.2d at 320-321) (Emphasis in original). Nevertheless, as the court below observed, the Government's expert witness was permitted to give opinion testimony "over the objections of the [petitioners] that the material appealed to the prurient interest of homosexuals, group sexual activists and persons interested in masochism, pedaphilia and zoophilia." (*Id.*) Over objection, the court instructed the jury that it was free to convict petitioners if it found that the brochure appealed to the prurient interest of undefined sexually deviant groups.

The Court of Appeals assumed that the testimony concerning sexually deviant groups constituted a variance of proof under the Government's answer to the bill of particulars, but concluded that this was not prejudicial because the testimony with regard to sexually deviant groups was allegedly directed to *The Illustrated Report* only and not to the brochure (481 F.2d at 321), and because petitioners' own experts allegedly covered the same field (481 F.2d at 322).

Concerning the court's instruction that the jury could measure the brochure by its appeal to the average person or some clearly defined sexually deviant group, the Court of Appeals concluded that when the instructions "are taken as a whole" the jury was properly instructed to measure the brochure solely by its appeal to the prurient interest of the average person (481 F.2d at 321).

The Government now argues that the Court of Appeals was wrong on both counts. The Government contends that the evidence that various pictures appeal to the prurient interest of different sexually deviant groups

"was not at variance with the Government's answer to the bill of particulars." [Govt. Br. 52, n. 33].[3] The Government also argued that it was proper to instruct the jury that it could measure the brochure by its appeal to sexually deviant groups [Govt. Br. 52-54]. In *Russell v. United States*, 369 U.S.749, 769, the Court stated that at every stage in the criminal proceeding of that case the accused "was met with a different theory, or by no theory at all. . . . Far from informing [him] of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." Those words might appropriately be spoken in connection with this case.

On the merits, it is plain that the Court of Appeals was correct in holding that the brochure had to be measured *solely* by its appeal to the average person. The Indictment was in statutory language only and made no reference to sexually deviant groups. The Government's response to the bill of particulars stated that the Government charged that the brochure appealed to the prurient interest of the average person. There was no evidence in the record that the brochure

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[3]The Government argues that at pretrial the Government made clear its intention to show that the material appealed to the prurient interest of sexually deviant groups [Govt. Br. 52, n. 33]. Petitioners moved for an order directing the Government to elect whether it was charging an appeal to the prurient interest of the average person or some other group, which motion was denied [J.A. 96]. Petitioners advised the court that they were unable to adequately defend under the circumstances [J.A. 96-97]. Petitioners moved, unsuccessfully, to strike all of the Government's testimony on appeal to prurient interest of sexually deviant groups [J.A. 148]. Before adducing any evidence on this issue, petitioners sought clarification by the trial court of this still "unsettled question" [J.A. 160-163].

was designed for or primarily distributed to anyone other than an average person. Neither the charge nor the evidence justified the giving of an instruction on the appeal of the brochure to sexually deviant groups. For all practical purposes, petitioners were tried under the now discredited *Hicklin* test. [See, *Miller*, 413 U.S. at 33].

IV

The Provisions of Title 18 United States Code §1461, on Their Face and as Construed and Applied, Violate the Free Speech and Press Provisions of the First Amendment and the Due Process Provisions of the Fifth Amendment, Because the Trial Court Instructed the Jury That It Could Find the Brochure Obscene Even if the Brochure Did Not Meet the Roth-Memoirs Test if the Jury Found "Pandering", Notwithstanding the Fact That Neither the Statute nor the Indictment Fairly Advised Petitioners That They Were Charged With Pandering.

The Government states that the propriety of the court's pandering instruction is "clearer when it is considered that the advertisement was being evaluated not only as a document charged as obscene in and of itself, but also as an advertisement of *The Illustrated Report*, an obscene book." [Govt. Br. 58]. The book is not obscene. On the contrary, it is plainly protected by the free speech and press provisions of the First Amendment. A book is presumed to be protected by the guarantees of the First Amendment unless and until it is proven to be obscene. The Government failed to satisfy the jury that the book was obscene. It is, therefore, entirely incorrect for the Government to attempt to justify giving a pandering instruction on the false assumption that the book is obscene.

The record contains no evidence of pandering. The brochure does not proclaim the book it advertises to be obscene. Indeed, the text of the brochure asserts the opposite. The entire thrust of the brochure is that *The Illustrated Report* furthers knowledge and understanding of an important political and social issue and contains important scientific information. The dominant note of the brochure is political. It asserts, in shorthand fashion, that the American people have nothing to be afraid of in viewing sexually explicit material. The brochure is not "a deliberate representation" of *The Illustrated Report* as erotically arousing. It is not an attempt at titillation. Rather, it is an appeal to reason. Moreover, a brochure cannot pander itself. *United States v. Pellegrino*, 467 F.2d 41 (9 Cir. 1972). See also, *United States v. Pinkus*, 333 F.Supp.928 (C.D. Calif. 1971).

The legislative history of Title 39 United States Code §3008—"Prohibiting of Pandering Advertisements"—discloses that its provisions were "not intended to prohibit" pandering material from being sent through the mails, if the individual to whom it is addressed wishes to receive it. [Br. for Pets. Hamling, *et al.*, 55-56]. The Government cites Title 39 United States Code §3011(e) in answer to petitioners' argument that Congress, having authorized the initial mailing of "pandering advertisements", the Government cannot now attempt to prove that petitioners violated 18 U.S.C. §1461 because they allegedly mailed such advertisements.[4] Title 39 U.S.C. §3011(e) provides that "nothing in this section or in section 3010 shall be construed as amending, preempting, limiting, modifying

[4]Petitioners deny that the brochure was a "pandering advertisement" [See, Br. for Pets. Hamling, *et al.*, 56, n. 9].

or otherwise in any way affecting section 1461. . . ." Section 3011(e) however was not in effect at the time petitioners allegedly mailed the brochure in December of 1970 and January of 1971. Section 3011(e) was enacted August 12, 1970 and became effective on the first day of the sixth month which begins after August 12, 1970, *i.e.*, on February 12, 1971, approximately one month *after* the last mailing of the brochure. See, *Pent-R-Books, Inc. v. United States Postal Service*, 328 F.Supp.297, 304-305 (E.D. N.Y. 1971). Prior to §3011(e) becoming effective, this Court held the predecessor to §3008 constitutional. *Rowan v. U.S. Post Office Dept.*, 397 U.S.728.

Congress, having addressed itself to the question of "pandering" in the mail, the "pandering" doctrine, announced in *Ginzburg v. United States*, 383 U.S.463, is now without vitality where the statutes operate.

V

The Brochure at Issue Is Protected by the Free Speech and Press Provisions of the First Amendment to the United States Constitution. It Is Neither Obscene in Fact nor in Law.

In *Miller*, the Court said: "The First Amendment protects works which, taken as a whole have serious . . . political or scientific value, regardless of whether the Government or a majority of the people approve of the ideas these works represent." (413 U.S. at 35). The Court emphasized the importance of keeping open "the free and robust exchange of ideas and political debate" (*Id.*). *The Illustrated Report* plainly has serious political and scientific value. It was those values that the brochure emphasized. An advertisement for a book is an essential link in the whole chain of communication

which makes freedom of press a reality. See, *New York Times Co. v. Sullivan*, 376 U.S.254, 266; *Smith v. California*, 361 U.S.147. Although it is true that petitioners were engaged in a commercial enterprise, no weight is to be ascribed to the fact "that petitioners have profited from the sale of publications which we have assumed but do not hold cannot themslves be adjudged obscene in the abstract; to sanction consideration of this fact might indeed induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzburg v. United States*, 383 U.S.463, 474. The brochure, like the book it advertises, is protected by the free speech and press provisions of the First Amendment.

VI

Petitioners Were Denied a Fair Trial, and Due Process of Law, When the Trial Court, in Open Defiance of Rule 30, Federal Rules of Criminal Procedure, Denied Petitioners the Opportunity to Make Objections to the Court's Jury Charge Outside the Presence of the Jury.

There is unanimity of opinion that Rule 30 of the Federal Rules of Criminal Procedure was violated when the court denied petitioners an opportunity to make objections to the court's charge "out of the presence of the jury".

The Government commences its argument by asserting, erroneously, that "for the purposes of the present controversy Rule 30 is an exact copy of Rule 51 of the Federal Rules of Civil Procedure" [Govt. Br. 69]. The Government sets forth the provisions of Rule 30

[Govt. Br. 68, n. 38] and the provisions of Rule 51 [Govt. Br. 69, n. 39]. A reading of the last sentence of each Rule reveals that under Rule 51 "opportunity shall be given to make objections to the charge out of the hearing of the jury." Under Rule 30, "opportunity shall be given to make such objections out of the hearing of the jury *and, on request of any party, out of the presence of the jury.*" The italicized words were added in 1966. It thus appears that the language of Rule 30 and Rule 51 is crucially different on the issue herein.

Since passage of the 1966 amendment to Rule 30, no conviction has been affirmed where an accused was denied the opportunity of making objections to the jury charge out of the presence of the jury, where such a request was properly made. Petitioners plainly made a proper request [J.A. 257]. Six of the cases cited by the Government in support of its position were decided prior to the 1966 amendment. *Sulton v. United States*, 249 F.2d 385 (5 Cir. 1957); *Hodges v. United States*, 243 F.2d 281 (5 Cir. 1951); *United States v. Hall*, 200 F.2d 957 (2 Cir. 1953); *United States v. Titus*, 221 F.2d 571 (5 Cir. 1955); *Lovely v. United States*, 169 F.2d 386, 391 (4 Cir. 1948); *Swain v. Boeing Airplane Co.*, 337 F.2d 940 (2 Cir. 1964). Even before the 1966 amendment, judgments were reversed for failure to permit objections to be taken out of the presence of the jury. *Hodges v. United States*, 243 F.2d 281 (5 Cir. 1957). See, *Lovely v. United States*, 169 F.2d 386, 391 (4 Cir. 1948). After the 1966 amendment, courts of appeal reversed judgments of conviction for a viola-

tion of Rule 30 in the following cases: *Hall v. United States*, 378 F.2d 349 (10 Cir. 1967); *United States v. Fernandez*, 456 F.2d 638 (2 Cir. 1972); *United States v. Schartner*, 426 F.2d 470 (3 Cir. 1970); *United States v. Huffman*, 467 F.2d 189 (6 Cir. 1972). [See, Br. for Pets. Hamling, *et al.*, 78-83.]

The court below stated that the rule announced in *United States v. Schartner, supra*, was the one to follow (481 F.2d at 325). In *Schartner*, as in the case at bar, the Government contended that the trial court's refusal to obey Rule 30 was harmless. The Third Circuit rejected this argument, stating that

> "there should be reversal for noncompliance with Rule 30 even where the defendant cannot affirmatively prove prejudice. Rule 30, as we have indicated, was designed to avoid subtle psychological pressures upon the jurors which would arise if they were to view and hear defense counsel in a posture of apparent antagonism toward the trial judge. . . . These pressures would be largely imperceptible, and it would be very difficult for a criminal defendant to prove their presence in a particular case. . . ." (426 F.2d at 479).

Petitioners believe that the rule announced in *Hall v. United States*, 378 F.2d 349 (10 Cir. 1967) is correct. But even under *Schartner*, petitioners are entitled to a reversal.

VII

Petitioners Were Denied a Fair Trial by an Impartial and Representative Jury, in Violation of the Guarantees of the Fifth and Sixth Amendments.

A. The Trial Court Abused Its Discretion and Denied Petitioners Due Process of Law When It Refused to Grant a Short Continuance Which Would Have Afforded Petitioners a Jury Panel Which Did Not Systematically and Absolutely Exclude All Persons Under 24 Years of Age.

The trial court recognized that young persons were in fact excluded from the venire and that such young persons would be better jurors for petitioners. The trial court said: "It may well be that the best possible of all worlds for the [petitioners] in this case would be to have jurors from age 18 to age 25. . . ." [R.T. 91]. The trial court also recognized that "it is time to change the jury master wheel" [R.T. 93] because of its exclusion of young persons. Petitioners moved for a short continuance so that young persons would be in the jury wheel and become potential trial jurors. The Motion for a Continuance was denied.

The Government argues that the trial court acted within its discretion in denying petitioners' Motion for a Continuance. It is true of course, as the Government contends, that the court is invested with a broad discretion in granting or denying a continuance [Govt. Br. 74]. But the discretion is not without its limitations. This Court has had occasion to observe that one way to attempt to assure that an accused is tried by a fair and impartial jury "is to grant a continuance of the trial".

Groppi v. Wisconsin, 400 U.S.505, 510. The Court, quoting from *Irvin v. Dowd*, 366 U.S.717, 722, said:

> "In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial . . . jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. . . . In the ultimate analysis, only the jury can strip a man of his liberty or his life."

In *Sheppard v. Maxwell*, 384 U.S.333, 354, n. 9, the Court said:

> "At the commencement of trial, defense counsel made motions for continuance and change of venue. . . . Without regard to whether the judge's actions in this respect reach dimensions that would justify issuance of the habeas writ, it should be noted that a short continuance would have alleviated any problem with regard to the judicial elections. The court in *Delaney v. United States*, 199 F.2d 107, 115 (C.A. 1st 1952), recognized such a duty under similar circumstances, holding that 'if assurance of a fair trial would necessitate that the trial of the case be postponed until after the election, then we think the law required no less than that.' "

The Government relies on *United States v. Rosenthal*, 470 F.2d 837, 844 (2 Cir. 1972), where the court stated that the decision whether to grant a continuance rests within the discretion of the district judge

subject to the requirement that his decision be reasonable. In the case at bar, petitioners contend that the judge's decision denying a short continuance was unreasonable, because it forced petitioners to trial before an age-biased jury.

B. The Trial Court Abused Its Discretion and Denied Petitioners Due Process of Law When It Improperly Refused to Ask Prospective Jurors Questions on Voir Dire Designed to Expose Their Biases and Prejudices Concerning "Obscenity" and Sex.

Although petitioners requested the court to do so, it refused to ask the prospective jurors any questions concerning the effect their religion may have on their attitudes towards sex and obscenity. Similarly, the court refused to ask the jurors whether they made contributions to or were associated in any way with the Citizens for Decent Literature and a number of other questions designed to expose the attitudes of the prospective jurors concerning obscenity and sex. [Br. for Pets. Hamling, *et al.*, 94-95]. Because of the highly emotional nature of the subject of obscenity, petitioners should have been allowed to make the inquiries they suggested to the court. The petitioners were denied a fair opportunity to question prospective jurors, so that they would have some basis for a reasonably knowledgable exercise of the peremptory challenge.

VIII

Petitioners' Fifth Amendment Rights to a Neutral and Unprejudiced Grand Jury Were Violated Because the Government Attorney Made Biased and Prejudiced Remarks to the Grand Jury Which Returned the Indictment.

The Government argues that petitioners' "unsupported allegations do not overcome the presumption of regularity which attends grand jury proceedings" [Govt. Br. 78]. Petitioners' complaint is not based on "unsupported allegations". Petitioners called to the witness stand the government attorney who presented the case to the Grand Jury which indicted them. He testified that he advised the Grand Jury to be "guided solely by their instinctive feelings. . . ." [R.T. 19-20]; that they were to be guided by the standards of "moral judgment" which they had "assimilated through the totality of their experiences" [R.T. 20-21]; that they were "the sole judges of the contemporary community standards of this country"; and that the term "contemporary community standards" refers to the "average conscience of the time" [R.T. 33].

The government attorney also testified concerning facts in the *Ginzburg* case, although he was not sworn as a witness [R.T. 26-29].

This evidence overcomes "the presumption of regularity which attends grand jury proceedings".

Conclusion.

Petitioner Hamling has been sentenced to prison for four years, for allegedly violating §1461. He and the corporate defendants have also been sentenced to pay heavy fines. Concededly, petitioners' trial took place in

a "no-man's land". They were, as the Government properly observed, "caught in a period of transition", their prosecutions having taken place before the *Miller* decisions. For the foregoing reasons, the judgments of conviction should be reversed with instructions to dismiss the Indictment.

Respectfully submitted,

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Attorney for Petitioners William L. Hamling, Reed Enterprises, Inc. and Library Service, Inc.

SAM ROSENWEIN and
FLEISHMAN, MCDANIEL, BROWN & WESTON,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-507

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Reply Brief for Petitioners Kemp, Wright and Thomas.

ARGUMENT.

I.

Mere Proof of Knowledge of Contents Is Not Sufficient to Establish Guilty Knowledge. The Trier of the Facts Should Be Required to Find Beyond a Reasonable Doubt That the Accused Knew the Contents of the Material; Was Aware of the Obscene Character of the Contents; and With Such Knowledge and Awareness, Intentionally Disseminated the Material With the Specific Intent to Appeal to the Prurient Interest of the Recipient. An Honest Belief That the Known Contents of a Publication Are Not Obscene Should Constitute a Defense. The Rulings of the Courts Below, and the Instructions and Failures to Instruct as Requested, Deprived Petitioners of Rights Guaranteed by the Provisions of the First, Fifth, Sixth and Eighth Amendments (Replying to Gov. Br. pp. 43-51).

The government states that the standard for judging *scienter* in federal obscenity prosecutions is as follows: "The proper test is whether petitioners were aware of the contents of the materials mailed." (Gov. Br. p. 43). The petitioners submit that such a standard for judging *scienter* is inconsistent with the rulings of this Court in *Roth v. United States, Smith v. California, Mishkin v. New York, Manual Enterprises, Inc. v. Day,* and *Ginsberg v. New York* (Pet. Br. pp. 18-32); contrary to accepted due process principles in ordinary criminal prosecutions (Pet. Br. pp. 32-37); violative of the First Amendment guarantees (Pet. Br. pp. 37-42); and unsupportable in law or logic (Pet. Br. pp. 42-50).

A. Relying upon the *Rosen* decision of 1896 and the decisions of appellate courts rendered in 1906

(*Burton v. United States*, 142 Fed.57), 1909 (*Knowles v. United States*, 170 Fed.409), and 1953 (*Schindler v. United States*, 208 F.2d 289) (Gov. Br. p. 44), all before the elements of the offense of obscenity were enunciated by this Court, the government asserts that congressional inaction in the light of these early decisions implicitly supports the government's position. There is no merit to this contention. Indeed, Congress did not seek to amend the statute in 1958 (Gov. Br. p. 44, n. 29), nor at any other time, when this Court in *Smith v. California*, *Mishkin v. New York*, and *Ginsberg v. New York* emphasized that the gloss placed on the words "character" of the contents means "calculated purveyance" of obscenity, and not mere knowledge of "contents".

B. The government evades the issue here presented by obscuring the primary distinction between the knowledge of the *essential facts* which bring the law into play and knowledge of *the existence of the statute and its meaning* as enunciated by this Court. We are told by the government that proof of knowledge of the "character" of the contents of the material is sufficient, but the Court is never informed as to what type of "character" is involved. The government has constantly refused to answer whether an accused in an obscenity prosecution may be convicted solely upon proof that he knew that the contents of the material dealt with "sex" or was "sexually oriented", or whether the proof was required to establish that the accused knew the obscene character of the contents of the material. The trial court refused every effort on the part of counsel for petitioners to obtain an elucidation for the benefit of the jury with respect to what was meant by "knowledge of the nature or character of the contents" (Pet. Br.

p. 20). The court below affirmed without any further explanation except to hold that the government need only prove that the accused knew the contents of the material. But, from *Roth* to *Miller* this Court has always stated that "sex" and "obscenity" are not the same, and clearly there can be no proof of guilty knowledge in an obscenity prosecution by mere proof that the accused was aware of the contents of material which dealt with sex. The government's brief fails to explain why the jury in this case was not told what was meant by the words "nature" and "character" and how it can be held that the jury was properly instructed as to the applicable law of the case, without a single reference to the need for proof of "calculated purveyance" of obscenity.

C. The government argues that it would be an "impossible and unrealistic burden" on the prosecutor to prove a defendant's knowledge of the *legal status* of the material (Gov. Br. p. 49). It is stated that as long as a defendant knows "the general character" of the material involved, he cannot claim that he was "unaware that his conduct might be illegal" (Gov. Br. p. 49). The government solicitously observes that there is no reason why the defendant should also be required to know that the materials "meet the current judicial standards of obscenity" (Gov. Br. pp. 49-50). Petitioners submit that these formulations by the government only result in an obfuscation of the issues. If the government is arguing that it should not be required to prove that an accused in an obscenity prosecution knew of the existence of an obscenity law, or this Court's interpretation of the law, then the short answer is that such a contention has never been made by the petitioners here. All that the petitioners are

urging here is that since "exceeding contemporary community standards", "appeal to prurient interest", and "utterly without social value" were material elements of obscenity at the time of this prosecution, the prosecution had the burden of proving knowledge of these qualities of the material. The government's burden was not merely to establish knowledge of the "general character" of the material, but awareness on the part of the petitioners of the obscene nature and character of the contents of the material. This burden to prove knowledge of the material elements of the offense is required in all areas of the criminal law with few exceptions (Pet. Br. pp. 35-37), and prosecutors in obscenity prosecutions have had no more difficulty in proving knowledge of the obscene nature and character of the materials than prosecutors have had in other areas where similar proof of guilty knowledge was required (Pet. Br. pp. 48-50).

D. The government relies on the decision in *Rosen*, and asserts that the decisions in *Smith v. California*, *Manual Enterprises, Inc. v. Day*, and *Mishkin v. New York* have "not departed from the Rosen rationale." (Gov. Br. p. 48). There is no mention by the government of this Court's decision in *New York Times Co. v. Sullivan*, 376 U.S.254. (See, Pet. Br. pp. 39-42).

Petitioners submit that the ruling in *Rosen v. United States* has been misinterpreted by the government, and that reliance upon the decision is both misplaced and untenable.

The same court which decided *Rosen v. United States* also decided *Price v. United States*, 165 U.S.311 (1897). In the *Price* case, a unanimous court held

that the indictment which charged the defendant with "unlawfully, wilfully, and knowingly" mailing the publication, an allegation substantially like the one contained in the *Rosen* case, must be taken to mean that "the defendant deposited in the mails a book *which he knew to be obscene*, . . . [T]his indictment is sufficient, because it does, in fact, contain a charge that the book was obscene, *to the knowledge of the defendant*, who knowingly and wilfully, *with such knowledge*, deposited it in the mails, and thus violated the statute." 165 U.S. at 312, 315 (emphasis added). Thus the applicable rule of law even as enunciated in the *Rosen* case means that the standard for judging *scienter* is knowledge of the alleged obscene nature and character of the material, a standard which was never given to the jury in the case herein by the trial court and where the government stipulated that the indictment charged no more than knowledge of contents (Pet. Br. pp. 18-19).

The conclusive presumption of *scienter* which the court in *Rosen* drew from proof of knowledge of the contents of the publication is without vitality, it is respectfully submitted. In 1896, the only standard for judging obscenity was an unconstitutional standard, to wit, the *Hicklin* standard, which, as applied, condemned an entire newspaper as obscene because some of the pages of the newspaper contained pictures of a female nude. In the light of the use of the *Hicklin* test by the court, and the omission of any discussion of the First Amendment, it was not difficult for the government to argue in 1896 that any accused should know that a picture of a female nude would be likely "to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands

it might come." But since 1896, this Court has recognized that every obscenity prosecution implicates First Amendment questions and that because of the developing standards for the protection of the freedoms of speech and press, the elements of the offense of obscenity must be far more narrowly confined. The attempt to take "judicial notice" or to "conclusively presume" knowledge of the obscene nature and character of the material solely from proof of knowledge of contents no longer can be justified, as a matter of logic or of law, in the 1970s. All experience is to the contrary (Pet. Br. pp. 42-48).

The government points to *Smith v. California*, 361 U.S.147 (Gov. Br. pp. 46-47). The government recognizes that this Court held the elimination of *scienter* to be an unreasonable requirement by the state, since it would result in "an undue restriction on the public's access to reading matter" (Gov. Br. p. 47). No attempt is made to explain why the same self-censorship on the part of booksellers, publishers and distributors would not be induced if conviction for guilty knowledge depends merely on proof that the accused knows that the contents of the material is sexually oriented. The government insists that this Court held in *Smith* that proof of knowledge of the "contents" of the book was sufficient to establish *scienter*, although it is plain from all of the opinions in the case that no judge of the court adopted such a view (Pet. Br. pp. 28-29). As appears hereafter, it is plain from Justice Brennan's statements in *Mishkin* and *Ginsberg*, that Justice Brennan used the term "contents" in *Smith v. California*, not as a definition of *scienter*, but as an expression of the minimal requirements of proof needed to establish the obscene character of the publications.

It is plain that Justice Harlan was of the view, in *Manual Enterprises, Inc. v. Day*, that the standard for judging *scienter* was proof of knowledge that the advertisers' works were obscene, and that the quality of proof in *Manual* was not sufficient to establish such a standard (Pet. Br. pp. 29-30). The attempt to distinguish *Manual* is not meaningful, nor does the government advance its position by describing Justice Harlan's statements as dicta (Gov. Br. p. 48). The government is sparing in its discussion of *Mishkin v. New York* (Gov. Br. p. 48). It repeats the quotation from the state court opinion which was emphasized by Justice Brennan, but it makes no mention of the important footnote 9 in the opinion, which pointedly rejected the test of "knowledge of contents" as a modification of the state court's definition of *scienter* (Pet. Br. pp. 30-31).

In further support of petitioners' analysis of the *Mishkin* decision, it may be helpful to the Court to examine the New York rulings to which Justice Brennan referred in his footnote 9 of the *Mishkin* case. In the first *Finkelstein* decision quoted in the *Mishkin* case, the Court, after construing the statute on the issue of *scienter*, reversed the judgment of conviction, stating: "At the time of the prosecutions of the violations herein, the prevailing precedent (*People v. Shapiro*, 6 A.D. 2d 271 [2d Dept.]) since soundly repudiated, however, (*People v. Richmond County News*, 11 A.D.2d 799 [3d Dept.]; see also, *People v. Douglas*, 12 A.D. 2d 194; *People v. Shenkman*, 12 A.D.2d 457) declared that *scienter* was not an element of the crime. Defendants, perhaps, believing because of Shapiro that their knowledge was irrelevant, did not take the stand or offer proof in this regard." 9 N.Y.2d at 346.

It will thus be noted that in the *Finkelstein* case the Court not only stressed the need for proof of intentional purveyance of obscenity, but that the Court, at the same time, called attention to the fact that lower court rulings had correctly repudiated prior decisions which suggested that proof of such *scienter* was unnecessary.

As noted above, the state court made reference, with approval, for example, to the New York Appellate Division ruling in *People v. Richmond County News.* In that case, the appellate court reversed the conviction upon the ground "that the proof in this case fails to establish beyond a reasonable doubt that defendant had knowledge of the *obscene character* of the magazine; and, in the absence of such proof, defendant's conviction cannot stand under the statute." 11 A.D.2d at 799. (Emphasis added). In *Douglas*, the other opinion referred to in *Finkelstein*, there was another reversal in this language: "It is our view, however, that the indictment is insufficient as it fails to allege knowledge on the part of defendants. Having decided that *scienter* is an essential element of the crime it would seem that this element must be alleged in the indictment. The various counts of the indictment state that defendants sold obscene magazines. This is not a crime unless the magazines are sold with the *knowledge*, actual or constructive, that they were *obscene*. Such a defect would be jurisdictional." 12 A.D.2d at 198 (Emphasis added).

In the case of *People v. Fritch*, 13 N.Y.2d 119, 243 N.Y.S.2d 1, 192 N.E.2d 713 (1963), also referred to in footnote 9 of the *Mishkin* opinion, the book *Tropic of Cancer* was held by the highest court of the State to be obscene [Cf., *Grove Press, Inc. v. Gerstein*, 378 U.S.577, 84 S.Ct. 1909, 12 L.Ed.2d 1305], but

the court ordered a new trial since "the jury's finding on the issue of *scienter* was against the weight of the evidence". 13 N.Y.2d at 126.

Moreover, it should be noted that not only has the government failed in its brief to discuss *New York Times Co. v. Sullivan*, but it also leaves unmentioned *Ginsberg v. New York*, 390 U.S.629, where the majority opinion emphasized that mere proof of knowledge of the "character and content" of any material was not sufficient without further proof of knowledge and intent to purvey obscene materials.

The government concedes that "obscenity is sometimes an elusive concept and persons who have knowledge of the contents and character of the materials may not know with absolute certainty whether the materials will be held legally obscene." (Gov. Br. p. 50). The government cannot suggest any resolution of this dilemma, except by pointing to the usual quotation from Mr. Justice Holmes in *United States v. Wurzbach* (Gov. Br. p. 50). In *Wurzbach*, the defendant was charged with a violation of the Federal Corrupt Practices Act. The statute made it an offense for a congressman or candidate to solicit contributions for any political purpose. The Court held that intentionally solicited contributions would violate the law, regardless of whether the purpose was to use the funds in a general election or in a state primary which might be under the control of the State. Justice Holmes did not, in *Wurzbach* or in *Nash*, create some talismanic label known as "take the risk". All that those cases held was that the

claim of unconstitutional vagueness in the statute was met by the legislative requirement of proof of a specific intent on the part of the accused to commit the elements of the offense which brought the laws into play.

The importance of the government's concession that obscenity is an elusive concept and that innocent persons may sometimes find themselves convicted of a violation of the law without proof of culpability is that without a stringent requirement of *scienter*, mistakes in fact finding may often occur in obscenity prosecutions with resultant diminution of First Amendment freedoms (Pet. Br. pp. 37-50).

E. The government quotes from some of the instructions given by the trial court (Gov. Br. p. 45), but it fails to include other instructions which bear importantly on the issue involved herein. Thus, the government points to the fact that the court instructed the jury that to establish specific intent, the government "must prove the defendant knowingly did an act which the law forbids purposely intending to violate the law" (JA 235). Of course, if this was the applicable law, it is clear that the record is absolutely barren of any evidence to establish that petitioners "purposely intended to violate the law". The government has never made such a claim and does not make such a claim here. More important, however, is the fact that the court instructed the jury that an act was done "knowingly" if it was done voluntarily and intentionally and not because of mistake or accident or other innocent reason (JA 235). Again, the government fails to note the addi-

tional qualification which the trial court placed on the meanings of the words "specific intent". Thus, the trial court charged the jury:

> "An act is willfully done, as I have stated before, if it is done voluntarily and intentionally and with the specific intent to do something the law forbids or, in this case, *with the specific intent or knowledge of the contents of the package.*" (JA 237) (Emphasis added).

Moreover, having thus instructed the jury that specific intent and knowledge was concerned only with the "contents" of the package, the court then added the following instruction:

> "It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted." (JA 237).

In the light of all the foregoing, it is plain that the case herein was tried on the theory that the standard for judging *scienter* requires no more than proof of knowledge of the contents of the material involved in the particular obscenity prosecution. The trial court never defined what was meant by the "nature and character" of the contents. The sole proof of intent required in support of the conspiracy charge and the substantive charges was knowledge of the contents, with knowledge reduced further to mere voluntary acts as distinguished from accidental acts.

Petitioners submit that the *mens rea* requirements in an obscenity prosecution should be no less than those which exist in the ordinary criminal prosecutions. Further, in order to avoid "the hazard of self-

censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity" (*Mishkin v. New York*, 383 U.S. at 511), the *scienter* requirement in obscenity prosecutions should include proof of knowledge of the alleged obscene nature and character of the material. The applicable law as given to the jury should include the requirement of proof of the knowledge of the contents of the material, awareness of the obscene nature and character of the material, and dissemination of the material with such guilty knowledge and specific intent to appeal to a prurient interest. A defense of honest belief that the known contents of the material are not obscene should be permitted in an obscenity prosecution.

There is no compelling interest to which the government can refer to justify the conviction of persons in an obscenity prosecution where knowledge of the essential facts which bring the law into play have not been established. There is no burden upon the government to prove that the petitioners knew that there was an obscenity law or knew that the standards for judging obscenity had been enunciated by this Court. Proof of the accused's awareness of the obscene character of the material may be established by direct or circumstantial evidence. The only requirement placed upon the government is to prove that the accused knew the obscene nature and character of the contents of the material, and this is a burden that can be fairly assumed by the government since, in the last analysis, the only charge made against an accused in an obscenity prosecution is that he *knowingly* mailed an *obscene* publication.

II.

The Record Is Barren of Any Evidence to Establish That Petitioners, or Any of Them, Knew the Contents of the Brochure. There Is No Evidence in the Record to Establish That Petitioners Corruptly Conspired to Violate the Federal Obscenity Statute by Mailing or Causing to Be Mailed the Alleged Obscene Brochure. There Is No Evidence in the Record to Establish That Petitioners Knowingly Mailed or Caused to Be Mailed or Aided and Abetted the Mailing of the Said Brochure (Replying to Gov. Br. pp. 63-68).

The government repeats that the sole standard for judging *scienter* in obscenity prosecutions is awareness of "the contents" of the material (Gov. Br. p. 63). Since the government is satisfied that proof of knowledge of contents alone will meet all constitutional and legal requirements, then assumedly the government must be prepared to establish such knowledge by substantial evidence beyond a reasonable doubt. The proof should be clear and unequivocal and leave no troubling doubt. Since the government itself concedes that we are dealing with "elusive concepts", where persons charged with knowledge of the contents of the material may not know the obscene nature and character of such contents, it is plain that the quality of proof of *scienter* on the terms which the government proposes must not be based on suspicion or conjecture, or on hyperbole or exaggeration. The proof should be directed to the charge made against the accused in an obscenity prosecution and not to irrelevant and extraneous evidence, entirely neutral in character, solely intended to obscure the absence of any evidence of guilt.

A. The specific charge against these petitioners was the knowing use of the mails for the mailing, and knowingly causing to be delivered by mail, the alleged obscene advertisement. Each of the substantive counts of the indictment charged violations of §§2 and 1461 of Title 18 by the knowing use of the mails for the mailing on specified dates of an envelope containing the alleged obscene advertisement from North Hollywood, California, to named recipients (JA 14-25). These were the sole charges made against the petitioners. They were not charged with violations of any law regulating the activities of corporate officers or corporate directors. The sole charge that the government had made was that each of these petitioners knew the contents of the particular brochure here involved and, knowing the contents, allegedly mailed the brochures or caused the brochures to be mailed on the particular dates named in the indictment. The petitioners submit that no competent evidence was offered to establish the specific *scienter* charged in the indictment as interpreted by the government (Pet. Br. pp. 51-63).

B. The government states that the evidence showed that petitioners Reed Enterprises, Inc., and Library Service, Inc., "were responsible" for mailing the advertising brochures (Gov. Br. p. 63). That is not an accurate reflection of this record. The record here shows that the business offices of all the corporate petitioners were located in San Diego, California, where the individual petitioners were employed. There is nothing in the record to indicate that these petitioners in any way had anything to do with the preparation of the brochure herein. The evidence presented by the government at the trial showed that the brochures were sent

from an organization known as Regent House in North Hollywood, California, to the Academy Addressing and Mailing Service in North Hollywood. Richard and Venita Harte, the husband and wife who inserted the brochures, testified that their only relationship was with Bernard Lieberman on behalf of Regent House (JA 122-123). We stress that this was the government's proof in the case herein. The Hartes were the only witnesses presented by the government, and they testified clearly and distinctly that they had never met any of the petitioners in the case herein, directly or indirectly (JA 126-132). The brochures were presumably, insofar as the record shows, picked up by Regent House in North Hollywood and mailed from North Hollywood (JA 130).

According to the government, the brochures were allegedly printed in North Hollywood by London Press, Inc. (Gov. Ex. 54; R.T. 827). Therefore, as the record shows here, the brochures were printed in North Hollywood, inserted in North Hollywood by persons who testified that they knew nothing at all concerning the petitioners here, and mailed from North Hollywood after being picked up by the same Regent House which had delivered them. In addition, it should be noted that although London Press, Inc., of North Hollywood, the alleged printer, and Robert Reitman, Paul Wisner and Bernard Lieberman, doing business as Regent House, were named in the indictment as unindicted co-conspirators (JA 14), none of these named persons nor any officer of these organizations was ever called by the government as a witness. There is a check from Reed Enterprises to Regent House and a check to London Press from Reed Enterprises bearing the signature of petitioner Hamling (Pet. Br. p. 9), but there is no evidence that any of these petitioners knew the contents

of this particular brochure, as alleged by the government. The government attempts to transmute the record in *Mishkin v. New York* into the case herein (Gov. Br. p. 64), but the record in *Mishkin* was quite distinct and separate from the barren record in the case herein. There is no evidence here that these petitioners, or any of them, had a "dominant" role in producing and distributing "obscene materials". These are perjorative statements without basis in fact.

C. The government states: "Petitioner Hamling played an active role in causing the brochure to be mailed" (Gov. Br. p. 64). There is not the slightest evidence in the record that petitioner Hamling played an "active role", or any role, in allegedly "causing the brochure to be mailed". There is no proof in the record to support this statement. On the contrary, the only evidence which the government relied on to prove its case against petitioner Hamling was his signature on the aforesaid two checks. There was not the slightest proof offered by way of declaration or conduct on the part of petitioner Hamling which could reasonably support a finding that the said petitioner knew the contents of the brochure which was mailed in North Hollywood. There is no proof in this record as to the size and extent of the businesses of the various corporate petitioners here or the size and number of employees in the various enterprises located in San Diego. The government is reduced to arguing that because the signature of petitioner Hamling appears on two checks, such neutral fact in itself justifies a finding beyond reasonable doubt that petitioner Hamling knew "the contents of the brochures and the fact that they were to be distributed through the mails" (Gov. Br. p. 64). There is simply no merit to this contention (Pet. Br. pp. 57-

58). It should be observed that on the basis of this attenuated record, petitioner Hamling was sentenced to imprisonment for four years.

D. The government states that petitioner Kemp was "the Vice President and Editorial Director of Greenleaf Classics, Inc., the publisher of the *Illustrated Report* (Gov. Exhs. 19, 21). Greenleaf Classics operated from the same business address as Reed Enterprises and Library Service (J.A. 138)" (Gov. Br. p. 64). These statements, of course, have nothing to do with the case herein. Petitioner Kemp was the editor of the *Illustrated Report*, but the jury did not agree that the *Illustrated Report* was obscene as charged in the indictment, and the book may therefore be deemed to be presumptively lawful and constitutional. To quote the government's own brief, "Greenleaf Classics, Inc., the publisher of the Illustrated Report, was also indicted, but was acquitted on the counts involving the advertisements, including conspiracy, and the jury was unable to reach a decision on the counts involving the Illustrated Report" (Gov. Br. p. 5, n. 3). It follows from all of this that the government has added nothing in its brief with respect to petitioner's alleged knowledge of the contents of a brochure mailed from North Hollywood, the only charge involved herein.

The only evidence that the government can point to is petitioner Kemp's signature on an application for a Post Office box, the box number which the government alleges appears on the brochure. But again the government simply ignores the record. The government's own evidence shows that the Post Office box number had already been in the name of Library Service, Inc., sometime prior to the date when petitioner Kemp

affixed his signature to an application for renewal. This signature was obtained as a result of the instigation by a postal inspector who conducted the investigation which led to the prosecution herein. A Post Office employee was sent to San Diego to insist that new signatures appear on the application for the same Post Office box. The petitioner Kemp was called out of his editorial office to sign the application for the postal employee. Petitioner Kemp did not know whether or not he held an officership in Library Service, Inc. The government's own witness testified as follows:

"Q. Did Earl Kemp make any specific statement to you regarding any officership he may or may not have held in Library Services?

A. The only thing he stated was that he did not know all of the officers nor his capacity in the various organizations.

Q. All right. Did Shirley Wright make any statement to you with respect to any positions Earl Kemp may or may not have held?

MR. KATZ: Hearsay as to Mr. Kemp, your Honor.

THE COURT: Overruled.

THE WITNESS: The only one that I knew of is that it was determined that she—in conversation between Mr. Kemp and Shirley Wright, that he was Vice-President of Library Services.

Q. You overheard this conversation while you were standing there?

A. While I was standing there they conversed with each other to try to determine the positions of each in Library Services." (JA 146).

It is plain from all the testimony revolving around the single incident of the renewal of the application for the Post Office box that petitioner Kemp at the most occupied only the nominal position of Vice President, that he was not even certain that he occupied such position, and that he signed as a mere formality and nothing more (JA 137-146). The sole charge against petitioner was that he knew the contents of the brochure, and the mere fact that the brochure bore a return Post Office box number gives no support to the charge made in the indictment that this petitioner knew the contents of the brochure or was in any way connected with its preparation, printing or mailing from North Hollywood.

The government labors to eke out some proof, but it is entirely unavailing. It is stated in the government's brief (p. 65) that the illustrations used in the brochure were taken from illustrations in the *Illustrated Report*, but this in no way establishes that the editor of the *Illustrated Report* was in any way responsible for the advertising brochure. The government points to petitioner's "dominant role as editor of the *Illustrated Report*" and "the nature of the relationship of Greenleaf Classics, in which petitioner served in an executive capacity, to the corporate petitioners" (Gov. Br. p. 65), but none of these statements serves in any way to establish the sole charge against petitioner that he knew the contents of the brochure herein. The government speaks of petitioner's "role in assisting with arrangements for the brochures' distribution by mail" (Gov. Br. p. 65), but there is not the slightest evidence to support this undocumented assertion.

The fact is that petitioner Kemp submitted a sworn affidavit indicating that he knew nothing concerning

the preparation or contents of the advertisement and that at the time the brochure was allegedly prepared and mailed in North Hollywood petitioner Kemp was in Europe on a business trip (Pet. Br. pp. 55-56). On a record barren of any evidence of guilt under the sole charge upon which a conviction was returned, the petitioner Kemp received a prison sentence of three years and one day.

E. There is not the slightest scintilla of evidence offered by the government (Gov. Br. pp. 65-66) to support the judgment of conviction against petitioner Thomas. It is stated that the petitioner signed "San Diego municipal business license applications" for the corporations; that he dealt with an employee of Pitney-Bowes regarding the rental of a postage meter; that the meter was "used for the mailing of the *Illustrated Report*", the alleged obscenity of which the jury could not agree upon; and that he signed a Library Service, Inc., check for payment on account with Reed Enterprises, Inc., "vendor for the Illustrated Report" (Gov. Br. p. 65). Of course none of the aforesaid has anything to do with the charge involved herein. Therefore, the government continues: "While these facts did not constitute direct evidence of Thomas' part in causing the mailing of the brochure, they did show that he was a pivotal corporate figure in Library Service, the petitioner identified on the brochure as responsible for its mailing." (Gov. Br. p. 66). There is not the slightest evidence that petitioner Thomas was a "pivotal corporate figure" in any of the corporate petitioners, nor does the name of any petitioner appear on the brochure. The name Library Service did appear on the brochure, but on the government's own proof the only persons "directly responsible for the mail distribution of the

brochure" were individuals doing business as Regent House in North Hollywood, persons whom the government never called as witnesses.

F. The government commences its discussion of proof with respect to petitioner Wright by immediately conceding that petitioner's involvement "is somewhat more attenuated" (Gov. Br. p. 66). The only evidence that the government has to offer is her employment as secretary and her occupation of various offices as what is obvious from the record is no more than nominal. That a corporation resolution authorized petitioner Wright to travel abroad, or that she typed and signed Post Office box rental applications for Post Office boxes, or that she received a letter from the printer with respect to the shipment of copies of the *Illustrated Report* (Gov. Br. pp. 66-67) adds nothing to the government's proof with respect to knowledge of the contents of the particular brochure involved herein. Thus, the government is compelled to speak of petitioner's position in "the corporate hierarchy", her "management of the everyday corporate affairs", as well as her "responsibility for the post office boxes rented by the corporation", as establishing that petitioner was in some way aware of the contents of the advertising brochure mailed out from North Hollywood.

Petitioners respectfully submit that there is no competent evidence in the record to establish knowledge of contents as claimed by the government. The government is unable to produce from a Reporter's Transcript of Proceedings, which is over 5,000 pages in length, any evidence, direct or circumstantial, which establishes the specific charge made against these petitioners and under which they were separately convicted. There is

not a single statement or a specific act on the part of any of these petitioners to which the government can point to establish that each of these petitioners, or any of them, knew the "contents" of the brochure. Thus the government is left to urge that "direct proof showing an actual examination of the brochure is unnecessary", and that anyone who deliberately "insulates himself against knowledge . . . is [not] to be free to maintain an emporium for smut" (Gov. Br. p. 67). But there has never been a claim made that "direct proof" is necessary to establish *scienter;* what is necessary, however, is proof, clear, convincing and unequivocal, which establishes the alleged guilty knowledge. Nor is there any proof in the record that these petitioners, or any of them, deliberately "insulated" themselves against knowledge.

The real essence of the government's position is this. The government does not desire to be burdened with any proof of *scienter* in an obscenity prosecution. The government is seeking to circumvent the ruling of *Smith v. California* and to impose strict liability in the obscenity area. The elimination of proof of *scienter* will, of course, ease the prosecutor's task in obscenity prosecutions, but it will do so only at the expense of those fundamental constitutional rights to which these petitioners and the public generally are entitled, as delineated in the decisions of this Court in *Smith v. California* and other related decisions.

F. The government devotes twelve lines of its brief to the charge of conspiracy (Gov. Br. pp. 67-68). The issue is discussed in petitioners' brief at pages 61-63. The government's argument is simply that the petitioners were shown to have acted "in concert" and that

this is sufficient to establish the charge contained in the indictment. Such a claim by the government has ominous portent. There is not a single publisher, distributor or bookseller, or film producer or exhibitor who, together with all corporate officers and employees, do not face a charge of conspiracy to violate the federal obscenity statute merely because some individual or officer allegedly "knew the contents" of a publication or film later found by some judge or jury in some local community to be "obscene".

In the case herein, there was no proof that these petitioners, or any of them, entered into a corrupt agreement knowing that the particular brochure involved herein would violate the federal obscenity statute. There was never even such a claim by the government at the trial level, and clearly there never has been any proof in support of such a charge. Yet, without proof of knowledge of the obscene nature and character of a publication, and without proof that with such guilty knowledge an intent existed to violate the law, there can be no conviction upon a charge of conspiracy (Pet. Br. p. 63). As this Court has stated:

> "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions. The important considerations of policy behind such warnings need not be again detailed. See Jackson, J., concurring in Krulewitch v. United States, supra." *Grunewald v. United States,* 353 U.S.391.

If this be true in ordinary conspiracy prosecutions, it is submitted that the standard of proof in charges of conspiracy to violate the obscenity statute should be

stricter, for we are here involved in an area where First Amendment questions are implicated, a point that this Court has repeatedly emphasized from *Roth* to *Miller*.

III.

The Wholesale Exclusion of Constitutionally Relevant Evidence Proffered by Petitioners Deprived the Petitioners of a Fair Hearing and Fair Trial, an Opportunity to Be Heard and to Defend Against the Charges, With Resultant Deprivation of Petitioners' Liberty, Contrary to the Free Speech and Press, Due Process and Fair Trial Provisions of the First, Fifth and Sixth Amendments (Replying to Gov. Br. pp. 37-43).

The government commences its discussion of this important issue by stressing that the defense had the opportunity to introduce "expert testimony". The question presented here, however, is not as to the abstract value of expert testimony, although it may be stated that the government's evaluation of the use of expert testimony before the trial jury in this case was somewhat less favorable than it is presently before this Court. The real issue is the validity of the trial court's ruling, as follows: "[I]t is the Court's opinion that the cases support the proposition that the Court is required to allow defense counsel to proceed in order to show the community standards involved, either by comparables, by the introduction of comparables *or* by the introduction of expert witnesses with respect to the elements to be shown." (JA 157-158) (Emphasis added). Here, therefore, was the exclusion of an entire category of evidence offered by the petitioners on the issues of obscenity and *scienter*, and while the trial court did permit petitioners to make a record with respect to the

evidence which was excluded, the fact remains that the trial court decided virtually from the inception of the trial to the end that no evidence would be permitted on behalf of petitioners except that which came from the oral testimony of expert witnesses. The government has not addressed itself to this issue, but has chosen instead to discuss various items of evidence which were offered by petitioners. Petitioners meet these separate issues separately, but it should be initially noted that the effect of the trial court's ruling was to turn aside every attempt by petitioners to introduce documentary and comparable evidence bearing on community standards. There was a wholesale exclusion in this case of constitutionally relevant evidence, and this was, it is submitted, violative of petitioners' constitutional rights to due process and a fair trial (Pet. Br. pp. 64-76).

A. The government contends that the mere fact that similar materials are *available* on newsstands does not demonstrate acceptability by the community. Since the defense experts concededly testified that the brochure did not appeal to prurient interest, was not patently offensive, and was not without social value, the government can see no value in informing the jury that "similar materials were available" (Gov. Br. p. 39). As the government puts it; "It is far less time consuming, more productive, and less confusing to the jury, if the experts testify only as to the subject materials." (Gov. Br. p. 39).

The significance of the government's argument is readily apparent. It is enough, states the government, for the jury to receive the opinion of the experts with respect to the particular publication involved. On the issue of contemporary community standards, the jury is not to be advised, according to the government, that compa-

rable material is available in the community. Such an argument in essence amounts to no more than a deprivation of an accused's right of a trial by jury.

It may be, as the government argues, that the availability of similar materials does not necessarily demonstrate acceptability by the community, but that issue is not presented in this case because the defense experts testified that comparable material, from their knowledge and experience, was reasonably accepted throughout the nation, and yet the trial court refused to admit such testimony (Pet. Br. pp. 67-68). In *United States v. Manarite*, 448 F.2d 583, a case relied upon by the government (Gov. Br. p. 39), the court was careful to note that while evidence of mere availability of similar materials was not probative of community standards, such similar materials would be admissible if the proof showed that the material enjoyed "a reasonable degree of community acceptance". The court noted that such proof would normally be supplied "by expert witnesses" and that no such proof had been offered (448 F.2d at 593). In the case herein, the following colloquy occurred between defense counsel and expert witness Dr. W. Cody Wilson:

> "Q Now earlier I showed you Defendants' QQ and RR. Do you recall seeing these before, sir?
>
> A Yes, I do.
>
> Q And could you tell us, Dr. Wilson, do these magazines have a reasonable degree of acceptance in the nation as a whole?
>
> A I think they do have.
>
> * * *

Q At this time, Dr. Wilson, I will show you these additional three publications and ask you to look those over.

A Yes, sir.

Q Are those publications I just handed you similar to the material you have seen in San Diego and other cities or different?

A They are similar to—I have seen these specific things in San Diego and in other places in the United States.

Q Do those three publications have a reasonable degree of acceptance in the nation as a whole?

A I think so.

* * *

MR. KATZ: Your Honor, at this time we would like to have QQ and RR marked in evidence. We are offering them in evidence. We would like these other three publications marked and placed in evidence.

THE COURT: Doctor, do they essentially depict what is set forth there as explicit sexual material—depict that which is set forth?

THE WITNESS: Yes, it fits into this definition of explicit sexual material.

THE COURT: I see no need for it to come into evidence, Mr. Katz. They may be marked for identification, but there is no need for them to come into evidence." (R.T. 3577-3579).

The fact is that comparable material which the defense experts testified found reasonable acceptance in the community was excluded from the jury's consideration because the trial court had decided that it would not permit any comparable testimony to be introduced

(JA 213-215). It should also be noted that the value of the testimony of the expert witnesses on behalf of petitioners was diminished by the refusal of the trial court to permit the jury to see the very publications which the experts testified were comparable to the brochure and available and accepted in the community. The jury was deprived of the opportunity to see the basis for the experts' opinion that the brochure here did not exceed the standards of the nation as a whole.

B. Turning to the discussion of particular items of evidence, it is significant that the government has not chosen to discuss the aforementioned comparable evidence offered by petitioners which met all the requirements of admissibility on the government's own terms and which concededly involved "explicit sexual material".

The government argues that publications which this Court "apparently concluded were not obscene" (Gov. Br. p. 40) were properly excluded because the introduction of such testimony would "confuse the jury" and "the probative value was slight" (Gov. Br. p. 41). It is also argued that no determination was made whether the film and magazines in *Pinkus* and *Burgin* were "truly comparable". These arguments appear to replace a defendant's right to a jury trial with the fiat of a government official. No valid reason is advanced to show why the showing of the single film and the two magazines would have been "confusing", and it is clearly not the function of an official to determine the "probative value" of evidence. That is a matter for the jury. The film and the publications were sufficiently comparable in matters dealing with sex and nudity to justify their admission into evidence unless some more

substantial reasons can be advanced than the mere generalities of "confusion" or "lack of probative value".

The argument of the government (Gov. Br. p. 41), that if the materials are "truly comparable" then there is all the more reason for the exclusion of such material from the jury after this Court has held such material to be constitutionally protected, is incomprehensible. If comparable material has been held constitutionally protected by this Court and has passed into the stream of communication and the thinking process of the community, it is a sheer denial of due process to refuse to permit a jury to see such material when a comparable publication is on trial for allegedly offending contemporary community standards. To argue, as the government does, that if fully comparable material which this Court has found to be constitutionally protected is not permitted into evidence before the jury, the rights of the accused will anyway be protected "by the stringent appellate view characteristic of this area" (Gov. Br. p. 41, n. 26) is reflective of the effort to diminish the right of the accused in an obscenity prosecution to a jury trial. Equally invalid and unacceptable is the argument by the government that a ruling requiring the admission of comparable materials which the courts have concluded are entitled to protection would cause trial courts "to err on the side of caution" and admit such evidence, with alleged confusion to the jury.

C. Other individual arguments in this area by the government are without merit. A comparable magazine, "Nude Living No. 63", was offered, both because it had second-class mailing privileges and because it was comparable and acceptable (JA 212-213). It was

relevant, it is submitted, for the jury to know that a comparable publication had second-class mailing privileges. Under the law, the Postmaster may revoke the entry of a publication as second-class mail if he finds that the conditions for entry and mailing as second-class are not met, as for example, if the publication is obscene and therefore nonmailable. See, 39 U.S.C. §§4352-4354 and the regulations thereunder.

The survey which the witness Virginia Carlson conducted to determine the reactions of the residents of San Diego to the *Illustrated Report* and the brochure was, according to the government, properly excluded because the survey was allegedly an attempt to evaluate the brochure by others instead of leaving the matter to the jury (Gov. Br. p. 43). This argument is plainly without merit. The witness was testifying in court; she was subject to cross-examination; and the government prosecutor had every opportunity to show any weakness in the survey, if there were any. That was a matter for the jury to decide. If the government is arguing here that such surveys with respect to community standards should never be admitted, it is sufficient to refer the government to this Court's decision in *Miller v. California*, 413 U.S.15, where it was held in note 12 of that opinion that a police officer was qualified as an expert to testify with respect to community standards and with respect to a "state-wide survey".

Conclusion.

The petitioners herein adopt all of the arguments contained in the reply brief submitted by the remaining petitioners in the case with the same force and effect as if fully set forth at length.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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Counsel for Petitioners Earl Kemp, Shirley R. Wright and David L. Thomas.

STANLEY FLEISHMAN and
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Of Counsel.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HAMLING ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-507. Argued April 15, 1974—Decided June 24, 1974

Petitioners were convicted of mailing and conspiring to mail an obscene advertising brochure with sexually explicit photographic material relating to their illustrated version (hereafter Illustrated Report) of an official report on obscenity, in violation of 18 U. S. C. §§ 2, 371, and 1461. The indictment under the latter section charged petitioners in the language of the statute, which provides in pertinent part that obscene material and written information as to where it may be obtained is nonmailable and that "[w]hoever knowingly uses the mails for the mailing . . . of anything declared by this section . . . to be non-mailable . . ." commits a crime. The jury was unable to reach a verdict on the counts charging the mailing of the allegedly obscene Illustrated Report. Following affirmance of the convictions by the Court of Appeals, this Court decided *Miller* v. *California*, 413 U. S. 15, and companion cases (hereafter collectively the *Miller* cases), after considering which, the Court of Appeals denied a petition for rehearing. Petitioners challenge their convictions based upon the pre-*Miller* obscenity test in *Memoirs* v. *Massachusetts*, 383 U. S. 413, and also as failing to meet the standards of the *Miller* cases; and challenge various procedural and evidentiary rulings of the District Court, as well as its instructions. *Held:*

1. Title 18 U. S. C. § 1461, "applied according to the proper standard for judging obscenity do[es] not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited," *Roth* v. *United States*, 354 U. S. 476, 492. P. 9.

2. The jury's determination that the brochure was obscene was supported by the evidence and was consistent with the *Memoirs* obscenity formulation. P. 10.

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3. The inability of the jury to reach a verdict on the counts charging distribution of the Illustrated Report had no relevance to its finding that the brochure was obscene, consistency in verdicts not being required, and the brochure being separable from the Illustrated Report. Pp. 10–11.

4. The standards established in the *Miller* cases do not, as applied to petitioners' pre-*Miller* conduct, require a reversal of their convictions. Pp. 11–27.

(a) Defendants like petitioners, who were convicted prior to the decisions in the *Miller* cases but whose convictions were on direct appeal at that time, should receive any benefit available to them from those decisions. P. 12.

(b) The instruction to the jury on the application of national community standards of obscenity was not constitutionally improper, since in rejecting the view in the *Miller* cases that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform national standards, the Court did not require as a constitutional matter the substitution of some smaller geographical area into the same sort of formula; the test was stated in terms of the understanding of the "average person applying contemporary community standards." The Court's holding in *Miller* that California could constitutionally proscribe obscenity in terms of a "statewide" standard did not mean that any such precise geographic area is required as a matter of constitutional law. Reversal is required in pre-*Miller* cases only where there is a probability that the excision of the references to the "country as a whole" in the instruction dealing with community standards would have materially affected the deliberations of the jury. Pp. 13–20.

(c) Construing 18 U. S. C. § 1461 as being limited to the sort of "patently offensive representations or description of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California*," the statute is not unconstitutionally vague, it being plain that the brochure is a form of hard-core pornography well within the permissibly proscribed depictions described in *Miller*. The enumeration of specific categories of obscene material in *Miller* did not purport to proscribe, for purposes of 18 U. S. C. § 1461, conduct that had not previously been thought criminal but instead added a "clarifying gloss" to the prior construction, making the statute's meaning "more definite." *Bouie* v. *City of Columbia*, 378 U. S. 347, 353. Pp. 20–26.

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(d) *Miller*'s rejection of *Memoirs*' "social value" formulation did not mean that 18 U. S. C. § 1461 was unconstitutionally vague at the time of petitioners' convictions because it did not provide them with sufficient guidance as to the proper test of "social value," that formula having been rejected not for vagueness reasons but because it departed from *Roth*'s obscenity definition and entailed a virtually impossible prosecutorial burden. P. 23.

5. The indictment was sufficiently definite. Pp. 26–27.

(a) The language of § 1461 was not "too vague to support conviction for crime," *Roth* v. *United States*, *supra*, at 480. P. 27.

(b) The indictment gave petitioners adequate notice of the charges against them, since at the time petitioners were indicted the statutory term "obscene," a legal term of art and not a generic expression, had a definite legal meaning and gave adequate notice of the charges against petitioners. *United States* v. *Russell*, 369 U. S. 749, distinguished. Pp. 27–29.

6. The District Court did not err in its instructions to the jury on scienter, including its instruction that "[petitioners'] belief as to the obscenity or non-obscenity of the materials is irrelevant," it being constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of materials that he distributes, and that he knew the character and nature of the materials. *Rosen* v. *United States*, 161 U. S. 29, followed; *Smith* v. *California*, 361 U. S. 147, distinguished. Pp. 29–34.

7. The Court of Appeals correctly concluded that there was substantial evidence to support the jury's verdict. P. 34.

8. The District Court did not abuse its discretion in excluding allegedly comparable materials (materials with second-class mailing privileges, or judicially found to have been nonobscene, or available on newsstands), since, *inter alia*, expert testimony had been allowed on relevant community standards; and similar materials or judicial determinations with respect thereto do not necessarily prove nonobscenity of the materials the accused is charged with circulating; and with respect to whether proffered evidence is cumulative, clearly relevant, or confusing, the trial court has considerable latitude. Pp. 35–37.

9. The District Court's instruction that in deciding whether the predominant appeal of the brochure was to a prurient interest in sex the jury could consider whether some portions appealed to a specifically defined deviant group as well as to the average person was not erroneous, since in measuring prurient appeal, the

jury (which was instructed that it must find that the material as a whole appealed generally to a prurient interest in sex) may consider the material's prurient appeal to clearly defined deviant sexual groups. *Mishkin* v. *New York*, 383 U. S. 502, 508–509. Pp. 37–39.

10. Since evidence of pandering can be relevant in determining obscenity, as long as the proper constitutional definition of obscenity is applied, *Ginzburg* v. *United States*, 383 U. S. 463, it was not improper for the District Court to instruct the jury in connection with the *Memoirs* test that it could also consider whether the brochure had been pandered by looking to the manner of its distribution and editorial intent. Pp. 40–41.

11. The Court of Appeals did not err in refusing to reverse petitioners' convictions for the District Court's failure to comply with Fed. Rule Crim. Proc. 30 by denying petitioners' counsel's request to make additional objections to the instructions out of the presence of the jury, since this Court's independent examination of the record confirms the Court of Appeals' view that petitioners were not prejudiced thereby. Pp. 41–45.

12. Petitioners' argument that the District Court abused its discretion in refusing to grant a continuance until a new jury with a presumably greater ratio of young people could be drawn is without merit, it having been almost four years since the jury wheel had last been filled, there having been no showing of a discriminatory exclusion of an identifiable group entitled to a group-based protection. Pp. 46–48.

13. The District Court's *voir dire* examination was sufficient to test the qualifications and competency of the prospective jurors and complied with Fed. Rule Crim. Proc. 24 (a), and that court did not constitutionally err in not asking certain questions propounded by petitioners. Pp. 49–50.

481 F. 2d 307, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73–507

William L. Hamling et al., Petitioners, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 24, 1974]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

On March 5, 1971, a grand jury in the United States District Court for the Southern District of California indicted petitioners William L. Hamling, Earl Kemp, Shirley R. Wright, David L. Thomas, Reed Enterprises, Inc., and Library Service, Inc., on 21 counts of an indictment charging use of the mails to carry an obscene book, The Illustrated Presidential Report of The Commission on Obscenity and Pornography, and an obscene advertisement, which gave information as to where, how, and from whom and by what means the Illustrated Report might be obtained, and of conspiracy to commit the above offenses, in violation of 18 U. S. C. §§ 2, 1461 and 371.[1] Prior to trial, petitioners moved to dismiss the indictment on the grounds that it failed to inform them of the charges, and that the grand jury had insufficient evidence before it to return an indictment and was improperly instructed on the law. Petitioners also challenged the petit jury panel and moved to strike the venire on ground that there had been an unconstitutional exclu-

[1] The indictment is reproduced in full in the Appendix at pp. 14–31.

sion of all persons under 25 years of age. The District Court denied all of these motions.

Following a jury trial, petitioners were convicted on 12 counts of mailing and conspiring to mail the obscene advertisement.[2] On appeal, the United States Court of Appeals for the Ninth Circuit affirmed. 481 F. 2d 307 (1973). The jury was unable to reach a verdict with regard to the counts of the indictment which charged the mailing of the allegedly obscene Illustrated Report.[3] The advertisement found obscene is a single sheet brochure mailed to approxmately 55,000 persons in various parts of the United States; one side of the brochure contains a collage of photographs from the Illustrated Report; the other side gives various information and an order blank from which the Illustrated Report could be ordered.

The Court of Appeals accurately described the photographs in the brochure as follows:

"The folder opens to a full page splash of pictures portraying heterosexual and homosexual intercourse,

[2] Each petitioner was convicted on counts 1–5 and 7–13 of the indictment. App. 9. Petitioner Hamling was sentenced to imprisonment for one year on the conspiracy count, and consecutive to that, concurrent terms of three years each on the 11 substantive counts, and he was fined $32,000. Petitioner Kemp was sentenced to imprisonment for one year and one day on the conspiracy count, and consecutive to that, concurrent terms of two years each on the 11 substantive counts. Petitioners Wright and Thomas received suspended sentences of one and one-half years, and were placed on probation for five years. Petitioners Reed Enterprises, Inc. and Library Services, Inc., were fined $43,000 and $12,000, respectively.

[3] Those counts on which the jury was unable to reach a verdict and upon which a mistrial was declared were counts 15, 16, 17, 19 and 21. App. 10. After presentation of the Government's case, the District Court dismissed four of the substantive counts (6, 14, 18, and 20) for lack of proof. App. 7; Brief for United States 6 n. 4. The obscenity *vel non* of the Illustrated Report was thus not at issue in the Court of Appeals nor is it at issue in this Court.

sodomy and a variety of deviate sexual acts. Specifically, a group picture of nine persons, one male engaged in masturbation, a female masturbating two males, two couples engaged in intercourse in reverse fashion while one female participant engages in fellatio of a male; a second group picture of six persons, two males masturbating, two fellatrices practicing the act, each bearing a clear depiction of ejaculated seminal fluid on their faces; two persons with the female engaged in the act of fellatio and the male in female masturbation by hand; two separate pictures of males engaged in cunnilinction; a film strip of six frames depicting lesbian love scenes including a cunnilinguist in action and female masturbation with another's hand and a vibrator, and two frames, one depicting a woman mouthing the penis of a horse, and a second poising the same for entrance into her vagina." 481 F. 2d, at 316–317.[4]

The reverse side of the brochure contains a fascimile of the Illustrated Report's cover, and an order form for the Illustrated Report. It also contains the following language:

"THANKS A LOT, MR. PRESIDENT. A monumental work of research and investigation has now become a giant of a book. All the facts, all the statistics, presented in the best possible format . . .

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[4] The only printed words appearing on the interfold of pictures are:

"In the Katzman Studies (1970) for the Commission (see page 180), some 90 photographs were rated on five-point scales for 'obscene' and 'sexually stimulating' by the control group. Group activity scenes of the type here demonstrated could have been part of the 90. Both these group sex pictures are from the Danish magazine Porno Club No. 3, supposedly this was filmed at a 'live show' night club in Copenhagen. There are many similar clubs."

and . . . completely illustrated in black and white and full color. Every facet of the most controversial report ever issued is covered in detail.

"The book is a MUST for the research shelves of every library, public or private, seriously concerned with the full intellectual freedom and adult selection.

"Millions of dollars in public funds were expended to determine the PRECISE TRUTH about eroticism in the United States today, yet every possible attempt to suppress this information was made from the very highest levels.

"Even the President dismissed the facts, out of hand. The attempt to suppress this volume is an inexcusable insult directed at every adult in this country. Each individual MUST be allowed to make his own decision; the facts are inescapable. Many adults, MANY OF THEM, will do just that after reading this REPORT. In a truly free society, a book like this wouldn't even be necessary."

The Court of Appeals indicated that the actual report of the Commission on Obscenity and Pornography is an official government document printed by the United States Government Printing Office. The major difference between the Illustrated Report, charged to be obscene in the indictment, and the actual report is that the Illustrated Report contained illustrations, which the publishers of the Illustrated Report said were included "as examples of the type of subject matter discussed and the type of material shown to persons who were part of the research projects engaged in for the Commission as basis for their Report." 481 F. 2d, at 315.

The facts adduced at trial showed that postal patrons in various parts of the country received the brochure advertising the Illustrated Report. The mailings these persons received consisted of an outer envelope, an inner

return envelope addressed to Library Service, Inc., at a post office box in San Diego, California, and the brochure itself, which also identified Library Service, Inc., at the same address, as the party responsible for the mailing. The outer envelopes bore a postmark that indicated they were mailed from North Hollywood, California, on or about January 12, 1971, and that the postage was affixed to the envelopes by a Pitney-Bowes meter number.

The mailing of these brochures was accomplished by petitioners through the use of other business. Approximately 55,000–58,000 of these brochures were placed in envelopes and postage was affixed to them by one Richard and one Venita Harte, who operate the Academy Addressing and Mailing Service. The brochures and the Pitney-Bowes meter number, with which they affixed the postage, were supplied to them by one Bernard Lieberman of Regent House, Inc., of North Hollywood, California, who, on January 11, 1971, had paid the United States Postal Service to set $3,300 worth of postage on the meter number. Regent House was billed $541.15 by the Hartes for their services. Regent House in turn charged its services and costs for the postage and the Harte's mailing service to Reed Enterprises, Inc., which paid the bill on January 19, 1971, with a check signed by petitioner Hamling.

Those individuals responding to the brochure would be sent copies of the Illustrated Report, which would be mailed with postage affixed by a second Pitney-Bowes meter number which was installed at Library Service, Inc., at the direction of an employee of Pitney-Bowes. The rental agreement for this meter was signed for Library Service by petitioner David Thomas, whom that employee identified as the person with whom he had dealt on the matter.

The evidence indicated that the individual petitioners

were officers in the corporate petitioners, and also indicated that they were involved with selling the Illustrated Report, which entailed mailing out the advertisement brochure. Petitioner Hamling, as president of Reed Enterprises, signed the check on the corporation's behalf in payment to Regent House for the mailing of the advertisement. Petitioner Kemp was the editor of the Illustrated Report, and was vice president of Library Service, Inc., and Greenleaf Classics, Inc., which is the publisher of the Illustrated Report.[5] He signed the application on behalf of Library Service, Inc., for the post office box in San Diego, which was the same post office box on the return envelope sent with the advertisement and on the advertisement itself. Petitioner Thomas signed the rental agreement for the latter postage meter which was used in affixing postage for sending copies of the Illustrated Report, and which Thomas directed to be installed at Library Service.

Petitioner Wright was the secretary of Reed Enterprises and Greenleaf Classics, Inc. Wright assisted the postal superintendent in obtaining Kemp's signature on the application for the post office box in San Diego. Wright also received a memorandum from London Press, Inc., the printer of the Illustrated Report, addressed to her as representative of Reed Enterprises, Inc., confirming the shipment of 28,537 copies of the Illustrated Report. Various other corporate documents tended to show the individual petitioners' involvement with the corporate petitioners. Both the Government and the petitioners introduced testimony from various expert witnesses concerning the obscenity *vel non* of both the Illustrated Report and the brochure.

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[5] Greenleaf Classics, Inc., was also indicted, but was acquitted on the counts involving the brochure, including the conspiracy count. As mentioned above, the jury was unable to reach a verdict on the counts involving the Illustrated Report. See n. 3, *supra*.

In affirming the convictions of these petitioners for the distribution of the obscene brochure, the Court of Appeals rejected various contentions made by the petitioners. The Court of Appeals also rejected petitioners' petition for rehearing and suggestion for rehearing en banc. We granted certiorari, — U. S. — (1974), and now affirm the judgment of the Court of Appeals.

I

These petitioners were convicted by a jury on December 23, 1971. App. 9. The Court of Appeals affirmed their convictions in an opinion filed on June 7, 1973. The Court of Appeals originally denied rehearing and suggestion for rehearing en banc on July 9, 1973. That order was withdrawn by the Court of Appeals to be reconsidered in light of this Court's decisions, announced June 21, 1973, in *Miller* v. *California*, 413 U. S. 15 (1973), and related cases,[6] and was submitted to the en banc court, by order dated August 20, 1973.[7] On August 22,

[6] *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973); *Kaplan* v. *California*, 413 U. S. 115 (1973); *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123 (1973); *United States* v. *Orito*, 413 U. S. 139 (1973).

[7] Upon withdrawing the original order denying rehearing for reconsideration in light of *Miller* v. *California*, *supra*, and the related cases, the Court of Appeals stated (Pet. for Cert. App. 39–40):

"We heretofore determined that the evidence was abundantly sufficient to meet, and the District Court's jury instructions in full compliance with, the essential elements of the *Roth-Memoirs* test. *United States* v. *One Reel of Film*, et al., — F. 2d — (1st Cir. July 16, 1973, No. 73-1181) at pages 5 and 7 of the slip opinion, in considering the same problem, succinctly states:

"'*A fortiori* the more relaxed standards announced by the Supreme Court were met.

"'[W]e see no possible reason to remand, especially as the Supreme Court has just addressed itself to the construction and adequacy of the federal statute involved. See *United States* v. *12 200-Ft. Reels of Super 8mm. Film*, *supra*, 41 U. S. L. W. at 4963, n. 7.'"

1973, the Court of Appeals entered an order denying the petition for rehearing and the suggestion for rehearing en banc.

The principal question presented by this case is what rules of law shall govern obscenity convictions had prior to the date on which this Court's decision in *Miller* v. *California*, *supra*, and its companion cases were handed down, but which had not at that point become final. Petitioners mount a series of challenges to their convictions based upon the so-called *Memoirs* test for the proscription of obscenity. They also attack the judgments as failing to comply with the standards enunciated in the *Miller* cases, and conclude by challenging other procedural and evidentiary rulings of the District Court.

Questions as to the constitutionality of 18 U. S. C. § 1461,[8] the primary statute under which petitioners

[8] 18 U. S. C. § 1461 provides in pertinent parts:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and

. . . . . .

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made,

. . . . . .

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or by section 3001 (e) of Title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter. . . ."

were convicted, were not strangers to this Court prior to the *Miller* decision. In *Roth* v. *United States*, 354 U. S. 476 (1957), the Court held that this statute did not offend the free speech and free press guarantees of the First Amendment, and that it did not deny the due process guaranteed by the Fifth Amendment because "too vague to support conviction for crime." *Id.*, at 480. That holding was reaffirmed in *United States* v. *Reidel*, 402 U. S. 351 (1971). See also *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478 (1962); *Ginzburg* v. *United States*, 383 U. S. 463 (1966). Prior to *Miller*, therefore, this Court had held that 18 U. S. C. § 1461 "applied according to the proper standard for judging obscenity, do[es] not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited." *Roth* v. *United States*, *supra*, 354 U. S., at 492.

These petitioners were tried and convicted under the definition of obscenity originally announced by the Court in *Roth* v. *United States*, *supra*, and significantly refined by the plurality opinion in *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966). The *Memoirs* plurality held that under the *Roth* definition

> "as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 383 U. S., at 418.

Petitioners make no contention that the instructions given by the District Court in this case were inconsistent with the test of the *Memoirs* plurality. They argue in-

stead that the obscenity *vel non* of the brochure has not been established under the *Memoirs* test. The Court of Appeals ruled against petitioners on this score, concluding that the jury's finding that the brochure was obscene under the *Memoirs* plurality test was correct. Petitioners argue at length that their expert witnesses established that the brochure did not appeal to a prurient interest in sex, that it was not patently offensive, and that it had social value. Examining the record below, we find that the jury could constitutionally find the brochure obscene under the *Memoirs* test. Expert testimony is not necessary to enable the jury to judge the obscenity of material which, as here, has been placed into evidence. See *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 56 (1973); *Kaplan* v. *California*, 413 U. S. 115, 120–121 (1973); *Ginzburg* v. *United States*, 383 U. S. 463, 465 (1966). In this case, both the Government and the petitioners introduced testimony through expert witnesses concerning the alleged obscenity of the brochure. The jury was not bound to accept the opinion of any expert in weighing the evidence of obscenity, and we conclude that its determination that the brochure was obscene was supported by the evidence and consistent with the *Memoirs* formulation of obscenity.

Petitioners nevertheless contend that since the jury was unable to reach a verdict on the counts charging the obscenity *vel non* of the Illustrated Report itself, that Report must be presumed to be nonobscene, and therefore protected by the First Amendment. From this premise they contend that since the brochure fairly advertised the Illustrated Report, the brochure must also be nonobscene. The Court of Appeals rejected this contention, noting that "[t]he premise is false. The jury made no finding of the charged obscenity of the Report." 481 F. 2d, at 315. The jury in this case did not *acquit* the petitioners of the charges relating to the distribu-

tion of the allegedly obscene Illustrated Report. It instead was unable to reach a verdict on the counts charging the distribution of the Illustrated Report, and accordingly, the District Court declared a mistrial as to those counts. App. 9–10. It has, of course, long been the rule that consistency in verdicts or judgments of conviction is not required. *United States* v. *Dotterweich*, 320 U. S. 277, 279 (1943); *Dunn* v. *United States*, 284 U. S. 390, 393 (1932). "The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in *Roth* v. *United States*, 354 U. S., at 492 n. 30, 'it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Cf. *Dunlop* v. *United States*, 165 U. S. 486, 499–500.'" *Miller* v. *California*, 413 U. S., at 26, n. 9. The brochure in this case stands by itself, and must accordingly be judged. It is not, as petitioners suggest, inseparable from the Illustrated Report, and it cannot be seriously contended that an obscene advertisement could not be prepared for some type of nonobscene material. If consistency in jury verdicts as to the obscenity *vel non* of identical materials is not constitutionally required, *Miller* v. *California*, *supra*, the same is true *a fortiori* of verdicts as to separate materials, regardless of their similarities.

Our *Miller* decisions dealing with the constitutional aspects of obscenity prosecutions were announced after the petitioners had been found guilty by a jury, and their judgment of conviction affirmed by a panel of the Court of Appeals. Our prior decisions establish a general rule that a change in the law occurring after a relevant event in a case will be given effect while the case is on direct review. *United States* v. *Schooner Peggy*, 1 Cranch 103

(1801); *Linkletter* v. *Walker*, 381 U. S. 618, 627 (1965); *Bradley* v. *School Board of Richmond*, — U. S. —, — (1974). Since the judgment in this case has not become final, we examine the judgments against petitioners in the light of the principles laid down in the *Miller* cases. While the language of 18 U. S. C. § 1461 has remained the same throughout this litigation, the statute defines an offense in terms of "obscenity," and this Court's decisions at least since *Roth* v. *United States*, *supra*, indicate that there are constitutional limitations which must be borne in mind in defining that statutory term. Thus any constitutional principle enunciated in *Miller* which would serve to benefit petitioners must be applied in their case.

Recognizing that the *Memoirs'* plurality test had represented a sharp break with the test of obscenity as announced in *Roth* v. *United States*, *supra*, our decision in *Miller* v. *California* reformulated the test for the determination of obscenity *vel non:*

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U. S., at 24.

The Court of Appeals held, on rehearing that the *Miller* cases generally prescribed a more relaxed standard of review under the federal Constitution for obscenity convictions, and that therefore petitioners could derive no benefit from the principles enunciated in those cases. See n. 7, *supra*. Petitioners concede that this observation may

be true in many particulars, but that in at least two it is not. They contend that the *Miller* treatment of the concept of "national standards" necessarily invalidates the District Court's charge to the jury in their case relating to the standard by which the question of obscenity was to be judged, and they further contend that the general language of 18 U. S. C. § 1461 is, in the light of the holding in the *Miller* cases, unconstitutionally vague.

A

The trial court instructed the jury that it was to judge the obscenity *vel non* of the brochure by reference to "what is reasonably accepted according to the contemporary standards of the community as a whole, . . . Contemporary community standards means the standards generally held throughout this country concerning sex and matters pertaining to sex. This phrase means, as it has been aptly stated, the average conscience of the time, and the present critical point in the compromise between candor and shame, at which the community may have arrived here and now." App. 241. Petitioners describe this as an instruction embodying the principle of "national standards" which, although it may have been proper under the law as it existed when they were tried, cannot be sustained under the law as laid down in *Miller*, where the Court stated:

> "Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact." 413 U. S., at 31–32.

Paradoxically, however, petitioners also contend that in order to avoid serious constitutional questions the standards in federal obscenity prosecutions *must* be national ones, relying on *Manual Enterprises, Inc.* v. *Day*,

370 U. S. 478, 488 (1962) (opinion of Harlan, J.), and *United States* v. *Palladino*, 490 F. 2d 499 (CA1 1973). Petitioners assert that our decisions in the two federal obscenity cases decided with *Miller*[9] indicate that this Court has not definitively decided whether the Constitution requires the use of nationwide standards in federal obscenity prosecutions.

We think that both of these contentions evidence a misunderstanding of our *Miller* holdings. *Miller* rejected the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform nationwide standards of what is obscene, describing such standards as "hypothetical and unascertainable," 413 U. S., at 31. But in so doing the Court did not require as a constitutional matter the substitution of some smaller geographical area into the same sort of formula; the test was stated in terms of the understanding of "the average person, applying contemporary community standards." 413 U. S., at 24. When this approach is coupled with the reaffirmation in *Paris Adult Theatre I.* v. *Slaton*, 413 U. S. 49, 56 (1973), of the rule that the prosecution need not as a matter of constitutional law produce "expert" witnesses to testify as to the obscenity of the materials, the import of the quoted language from *Miller* becomes clear. A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law. *Stone* v. *New York, Chicago & St. Louis R. Co.*, 344 U. S. 407, 409 (1953); *Schultz* v. *Pennsylvania R. Co.*, 350 U. S. 573, 525–526 (1956). Our holding in *Miller* that Cali-

[9] *United States* v. *Orito*, 413 U. S. 139 (1973); *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123 (1973).

fornia could constitutionally proscribe obscenity in terms of a "statewide" standard did not mean that any such precise geographic area is required as a matter of constitutional law.

Our analysis in *Miller* of the difficulty in formulating uniform national standards of obscenity, and our emphasis on the ability of the jurior to ascertain the sense of the "average person, applying contemporary community standards" without the benefit of expert evidence, clearly indicates that 18 U. S. C. § 1461 is not to be interpreted as requiring proof of the uniform national standards which were criticized in *Miller*. In *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123 (1973), a federal obscenity case decided with *Miller*, we said:

> "We have today arrived at standards for testing the constitutionality of state legislation regulating obscenity. See *Miller* v. *California, ante*, at 23–25. These standards are applicable to federal legislation." *Id.*, at 129–130.

Included in the pages referred to in *Miller* is the standard of "the average person, applying contemporary community standards." In view of our holding in *12 200-ft. Reels of Film*, we hold that 18 U. S. C. § 1461 incorporates this test in defining obscenity.

The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion "the average person, applying contemporary community standards" would reach in a given case. Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that "community" upon which the

jurors would draw. But this is not to say that a District Court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jury in the resolution of the issues which they were to decide.

Our Brother BRENNAN suggests in dissent that in holding that a federal obscenity case may be tried on local community standards, we do violence both to congressional prerogative and to the Constitution. Both of these arguments are foreclosed by our decision last Term in *United States* v. *12 200-ft. Reels of Film*, *supra*, that the *Miller* standards, including the "contemporary community standards" formulation, applied to federal legislation. The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity. Those same distributors may be subjected to such varying degrees of criminal liability in prosecutions by the States for violations of state obscenity statutes; we see no constitutional impediment to a similar rule for federal prosecutions. In *Miller* v. *California*, 413 U. S., at 32, we cited with approval Mr. Chief Justice Warren's statement that:

> "[W]hen the Court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards—not a national standard, as it is sometimes argued. I believe that there is no provable 'national standard,' and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one. It is said that such a 'community' approach may well result

in material being proscribed as obscene in one community but not in another, and, in all probability, that is true. But communities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals." *Jacobellis* v. *Ohio*, 378 U. S. 184, 200–201 (Warren, C. J., dissenting).

Judging the instruction given by the District Court in this case by these principles, there is no doubt that its occasional references to the community standards of the "country as a whole" delineated a wider geographical area than would be warranted by *Miller, 12 200-ft. Reels of Film*, and our construction of section 1461 herein, *ante*, at —. Whether petitioners were materially prejudiced by those references is a different question. Certainly the giving of such an instruction does not render their convictions void as a matter of constitutional law. This Court has emphasized on more than one occasion that a principal concern in requiring that a judgment be made on the basis of "contemporary community standards" is to assure that the material is judged neither on the basis of each juror's personal opinion, or by its effect on a particularly sensitive or insensitive person or group. *Miller* v. *California, supra*, 413 U. S., at 33; *Mishkin* v. *New York*, 383 U. S. 502, 508–509 (1966); *Roth* v. *United States*, 354 U. S. 476, 489 (1957). The District Court's instruction in this case, including its reference to the standards of the "country as a whole," undoubtedly accomplished this purpose.

We have frequently held that jury instructions are to be judged as a whole, rather than by picking isolated phrases from them. *Boyd* v. *United States*, 271 U. S. 104, 107 (1926). In the unusual posture of this case,

in which petitioners agree that the challenged instruction was proper at the time it was given by the District Court, but now seek to claim the benefit of a change in the law which casts doubt on the correctness of portions of it, we hold that reversal is required only where there is a probability that the excision of the references to the "country as a whole" in the instruction dealing with community standards would have materially affected the deliberations of the jury. Cf. *Namet* v. *United States*, 373 U. S. 179, 190–191 (1963); *Lopez* v. *United States*, 373 U. S. 427, 436 (1963). Our examination of the record convinces us that such a probability does not exist in this case.

Our Brother BRENNAN takes us to task for reaching this conclusion, insisting that the District Court's instructions and its exclusion of the testimony of a witness, Miss Carlson, who had assertedly conducted a survey of standards in the San Diego area requires that petitioners be accorded a new trial. As we have noted *infra*, at——, the District Court has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony. *Stillwell Manufacturing Co.* v. *Phelps*, 130 U. S. 520, 527 (1889); *Barnes* v. *Smith*, 305 F. 2d 226, 232 (CA10 1962); II J. Wigmore, Evidence § 561 (3d ed. 1940).[10] But even assuming that the Dis-

[10] The stated basis for the District Court's exclusion of the testimony of Miss Carlson was that her survey was not framed in terms of "national" standards, but it is not at all clear that the District Court would have admitted her testimony had it been so framed. "[A] specific objection *sustained* . . . is sufficient, though naming an untenable ground, if some other tenable one existed." I J. Wigmore, Evidence § 18 (3d ed. 1940), citing *Kansas City So. R. Co.* v. *Jones*, 241 U. S. 181 (1916). Miss Carlson was a student at San Diego State University who worked part time at F. W. Woolworth, doing composition layouts of newspaper advertising for the company's store in Fashion Valley. She had undertaken a "Special Studies"

trict Court may have erred in excluding the witness' testimony in light of the *Miller* cases, we think arguments made by petitioners' counsel and urging the admission of the survey re-emphasize the confusing and often gossamer distinctions between "national" standards and other types of standards. Petitioners' counsel, in urging the District Court to admit the survey, stated:

> "... We have already had experts who have testified and expect to bring in others who have testified both for the prosecution and the defense that the material that they have found was similar in all cities..."
>
> "This witness can testify about experiences she had in one particular city. Whether this is or not a typical city is for the jury to decide." R. T. 3932.
>
> "Now this supports the national survey. It is not something that stands alone. The findings here are consistent with the national survey and is part of the overall picture, taking into account, of course, that this is something that has taken place after the national survey, which was about two years ago, that Dr. Abelson performed." R. T. 3934–3935.

The District Court permitted Dr. Wilson, one of the four expert witnesses who testified on behalf of petitioners, to testify as to materials he found available in San Diego, as a result of having spent several days there. R. T. 3575. He was then asked by petitioners' counsel whether this material was "similar to or different than" the material found in other cities where he had also visited adult bookstores. The witness responded that he

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course with her Journalism professor, Mr. Haberstroh, who was also offered by petitioners as an expert witness at the trial. Miss Carlson had circulated through the San Diego area and asked various persons at random whether they thought "adults should be able to buy and view this book and material." R. T. 3926.

thought "essentially the same kinds of material are found throughout the United States." R. T. 3577. These statements, in colloquies between counsel and Dr. Wilson, only serve to confirm our conclusion that while there may have been an error in the District Court's references to the "community standards of the country as a whole" in its instructions, and in its stated reasons for excluding the testimony of Miss Carlson, these errors do not require reversal under the standard previously enunciated.[11]

B

Petitioners next argue that prior to our decision in *Miller*, 18 U. S. C. § 1461 did not contain in its language, nor had it been construed to apply to, the specific types of sexual conduct referred to in *Miller*, and therefore the section was unconstitutionally vague as applied to them in the prosecution of these cases. Such an argument, however, not only neglects this Court's decisions prior to *Miller* rejecting vagueness challenges to the federal

[11] The sequence of events in this case is quite different from that in *Saunders* v. *Shaw*, 244 U. S. 13 (1917), upon which our Brother BRENNAN relies. There the Supreme Court of Louisiana directed the entry of judgment against an intervening defendant who had prevailed in the trial court, on the basis of testimony adduced merely as an offer of proof by the plaintiff, and to which the intervening defendant had therefore had no occasion to respond. Since the trial court had ruled that the issue to which plaintiff's proof was addressed was irrelevant, this Court reversed the Supreme Court of Louisiana in order that the intervening defendant might have an opportunity to controvert the plaintiff's proof. Here petitioners were given full latitude in rebutting every factual issue dealt with in the government's case, and no claim is made that the jury was permitted to rely on evidence introduced merely by way of offer of proof which was not subject to cross-examination or to contradiction by countervailing evidence offered by the petitioners. The present case seems to us much closer to *Ginzburg* v. *United States*, 383 U. S. 463 (1966), than to *Saunders*.

statute, but also fundamentally misconceives the thrust of our decision in the *Miller* cases.

In *Roth* v. *United States*, 354 U. S. 476, 491 (1957), we upheld the constitutionality of 18 U. S. C. § 1461 against a contention that it did "not provide reasonably ascertainable standards of guilt and therefore violate[s] the constitutional requirements of due process." In noting that the federal obscenity statute made punishable the mailing of material that is "obscene, lewd, lascivious, or filthy . . . [and of] other publications of an indecent character," the Court stated in *Roth*:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' *United States* v. *Petrillo*, 332 U. S. 1, 7–8. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .' *Id.*, at 7." 354 U. S., at 491–492 (footnote omitted).

Other decisions dealing with the pre-Miller constitutionality or interpretation of 18 U. S. C. § 1461 in other contexts have not retreated from the language of *Roth*. See, *e. g.*, *United States* v. *Reidel*, 402 U. S. 351 (1971);

Ginzburg v. *United States*, 383 U. S. 463 (1966); *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478 (1962). And as made clear by the opinion of Mr. Justice Harlan in *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478 (1962), the language of 18 U. S. C. § 1461 had been, prior to the date of our decision in *Miller*, authoritatively construed in a manner consistent with *Miller*:

> "The words of section 1461, 'obscene, lewd, lascivious, indecent, filthy or vile,' connote something that is portrayed in a manner so offensive as to make it unacceptable under current community *mores*. While in common usage the words have different shades of meaning, the statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex. Although the statute condemns such material irrespective of the *effect* it may have upon into whose hands it falls, the early case of *United States* v. *Bennett*, 24 Fed. Cas. 1093 (No. 14571), put a limiting gloss upon the statutory language: the statute reaches only indecent material which, as now expressed in *Roth* v. *United States*, *supra*, at 489, 'taken as a whole appeals to prurient interest.'" 370 U. S., at 482–484 (footnotes omitted) (emphasis original).

At no point does *Miller* or any of the other obscenity decisions decided last term intimate that the constitutionality of pre-*Miller* convictions under statutes such as 18 U. S. C. § 1461 was to be cast in doubt. Indeed, the contrary is readily apparent from the opinions in those cases. We made clear in *Miller*, 413 U. S., at 24, n. 6, that our decision was not intended to hold all state statutes inadequate, and we clearly recognized that existing statutes "as construed heretofore or hereafter may well be adequate." That recognition is emphasized in our opinion in *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123

(1973). That case had come to this Court on appeal from the District Court's dismissal of the Government's forfeiture action under 19 U. S. C. § 1305 (a), which statute the District Court had found unconstitutional. In vacating the District Court's constitutional decision and remanding the case to the District Court for a determination of the obscenity *vel non* of the materials there involved, we stated:

> "We further note that, while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes where 'a serious doubt of constitutionality is raised' and 'a construction of the statute is fairly possible by which the question may be avoided.' *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 369 (1971) (opinion of WHITE, J.), quoting from *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). If and when such a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material in 19 U. S. C. § 1305 (a) and 18 U. S. C. § 1462, see *United States* v. *Orito*, [413 U. S.,] at 140 n. 1, we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California, ante*, at 25. See *United States* v. *Thirty-seven Photographs, supra*, at 369–374 (opinion of WHITE, J.). Of course, Congress could always define other specific 'hard core' conduct." 413 U. S., at 130, n. 7.

Miller undertook to set forth examples of the types of material which a statute might proscribe as portraying sexual conduct in a patently offensive way, 413 U. S., at 25–26, and went on to say that no one could be prosecuted

for the "sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." *Id.*, at 27. As noted above, we indicated in *United States* v. *12 200-ft. Reels of Film*, 413 U. S., at 130 n. 7, that we were prepared to construe the generic terms in 18 U. S. C. § 1462 to be limited to the sort of "patently offensive representations or description of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California*." We now so construe the companion provision in 18 U. S. C. § 1461, the statute under which this prosecution was brought. As so construed, we do not believe that petitioners' attack on the statute as unconstitutionally vague can be sustained.

Miller, in describing the type of material which might be constitutionally proscribed, 413 U. S., at 25, was speaking in terms of substantive constitutional law of the First and Fourteenth Amendments. See *Jenkins* v. *Georgia*, *post*, p. —. While the particular descriptions there contained were not intended to be exhaustive, they clearly indicate that there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is "patently offensive" within the meaning of the obscenity test set forth in the *Miller* cases. And while the Court in *Miller* did refer to "specific prerequisites" which "will provide fair notice to a dealer in such materials," 413 U. S., at 27, the Court immediately thereafter quoted the language of the Court in *Roth* v. *United States*, 354 U. S., at 491–492, concluding with these words:

> "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . ." 413 U. S., at 28 n. 10.

The *Miller* cases, important as they were in enunciating a constitutional test for obscenity to which a majority of the Court subscribed for the first time in a number of years, were intended neither as legislative drafting handbooks or as manuals of jury instructions. 18 U. S. C. § 1461 had been held invulnerable to a challenge on the ground of unconstitutional vagueness in *Roth;* the language of *Roth* was repeated in *Miller,* along with a description of the types of material which could constitutionally be proscribed and the adjuration that such statutory proscriptions be made explicit either by their own language or by judicial construction; and *United States* v. *12 200-ft. Reels of Film, supra,* made clear our willingness to construe federal statutes dealing with obscenity to be limited to material such as that described in *Miller.* It is plain from the Court of Appeals' description of the brochure involved here that it is a form of hard-core pornography well within the types of permissibly proscribed depictions described in *Miller,* and which we now hold § 1461 to cover. Whatever complaint the distributor of material which presented a more difficult question of obscenity *vel non* might have as to the lack of a previous limiting construction of 18 U. S. C. § 1461, these petitioners have none. See *Dennis* v. *United States,* 341 U. S. 494, 511–515 (1951) (opinion of Vinson, C. J.).

Nor do we find merit in petitioners' contention that cases such as *Bouie* v. *City of Columbia,* 378 U. S. 347 (1964), require reversal of their convictions. The Court in *Bouie* held that since the crime for which the petitioners there stood convicted was "not enumerated in the statute" at the time of their conduct, their conviction could not be sustained. *Id.,* at 363. The Court noted that "a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of nar-

row and precise statutory language." 378 U. S., at 352. But the enumeration of specific categories of material in *Miller* which might be found obscene did not purport to make criminal, for the purpose of 18 U. S. C. § 1461, conduct which had not previously been thought criminal. That requirement instead added a "clarifying gloss" to the prior construction and therefore made the meaning of the federal statute involved here "more definite" in its application to federal obscenity prosecutions. *Bouie* v. *City of Columbia*, 378 U. S., at 353. Judged by both the judicial construction of § 1461 prior to *Miller*, and by the construction of that section which we adopt today in the light of *Miller*, petitioners' claims of vagueness and lack of fair notice as to the proscription of the material which they were distributing must fail.

C

Petitioners' final *Miller*-based contention is that our rejection of the third part of the *Memoirs* test and our revision of that test in *Miller* indicates that 18 U. S. C. § 1461 was at the time of their conviction unconstitutionally vague for the additional reason that it provided insufficient guidance to them as to the proper test of "social value." But our opinion in *Miller* plainly indicates that we rejected the *Memoirs* "social value" formulation, not because it was so vague as to deprive criminal defendants of adequate notice, but instead because it represented a departure from the definition of obscenity in *Roth*, and because in calling on the prosecution to "prove a negative," it imposed a "[prosecutorial] burden virtually impossible to discharge" and which was not constitutionally required. *Miller* v. *California*, 413 U. S., at 22. Since *Miller* permits the imposition of a lesser burden on the prosecution in this phase of the proof of obscenity than did *Memoirs*, and since the jury convicted these peti-

tioners on the basis of an instruction concededly based on the *Memoirs* test, petitioners derive no benefit from the revision of that test in *Miller*.

II

Petitioners attack the sufficiency of the indictment under which they were charged for two reasons: first, that it charged them only in the statutory language of 18 U. S. C. § 1461, which they contend was unconstitutionally vague as applied to them; and second, that the indictment failed to give them adequate notice of the charges against them. As noted above, however, at the time of petitioners' convictions, *Roth* v. *United States*, *supra*, had held that the language of § 1461 was not "too vague to support conviction for crime." *Id.*, at 480. See *United States* v. *Reidel*, 402 U. S. 351, 354 (1971).

Our prior cases indicate that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which they must defend, and, second, enables them to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hagner* v. *United States*, 285 U. S. 427 (1932); *United States* v. *Debrow*, 346 U. S. 374 (1953). It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as "those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." *United States* v. *Carll*, 105 U. S. 611, 612 (1881). "Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *United States* v. *Hess*, 124 U. S. 483, 487 (1888).

United States v. *Russell*, 369 U. S. 749 (1962), relied upon by petitioners, does not require a finding that the indictment here is insufficient. In *Russell*, the indictment recited the proscription of 2 U. S. C. § 192, and charged that the defendants had refused to answer questions that "were pertinent to the question then under inquiry by a committee of Congress." In holding that the indictment was insufficient because it did not state the subject which was under inquiry, this Court stated:

> "[T]he very core of criminality under 2 U. S. C. § 192 is pertinency to the subject under inquiry of the questions which the defendant refused to answer. What the subject actually was, therefore, is central to every prosecution under the statute. Where guilt depends so crucially upon such *a specific identification of fact*, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute." 369 U. S., at 764 (emphasis added).

The definition of obscenity, however, is not a question of fact, but one of law; the word "obscene," as used in 18 U. S. C. § 1461, is not merely a generic or descriptive term, but a legal term of art. See *Roth* v. *United States*, 354 U. S., at 487–488; *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 482–487 (1962) (opinion of J. Harlan); *United States* v. *Thevis*, 484 F. 2d 1149, 1152 (CA5 1973), cert. pending, No. 73–1075; *United States* v. *Luros*, 243 F. Supp. 160, 167 (ND Iowa), cert. denied, *sub nom.*, 382 U. S. 956 (1965). The legal definition of obscenity does not change with each indictment; it is a term sufficiently definite in legal meaning to give a defendant notice of the charge against him. *Roth* v. *United States*, *supra*, at 491–492; *Manual Enterprises, Inc.* v. *Day*, *supra*, at 482–487 (opinion of J. Harlan). Since the various component parts of the constitutional definition of ob-

scenity need not be alleged in the indictment in order to establish its sufficiency, the indictment in this case was sufficient to adequately inform petitioners of the charges against them.[12]

Petitioners also contend that in order for them to be convicted under 18 U. S. C. § 1461 for the crime of mailing obscene materials, the Government must prove that they knew the materials mailed were obscene. That statute provides in pertinent part that "[w]hoever knowingly uses the mails for the mailing . . . of anything declared by this section . . . to be non-mailable . . ." is guilty of the proscribed offense. Consistent with the statute, the District Court instructed the jury *inter alia* that in order to prove specific intent on the part of these petitioners, the Government had to demonstrate that petitioners "knew the envelopes and packages containing the subject materials were mailed or placed . . . in Interstate Commerce, and . . . that they had knowledge of the character of the materials." App. 236. The District Court further instructed that the "[petitioners'] belief as to the obscenity or non-obscenity of the materials is irrelevant." *Ibid.*

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[12] Petitioners' further contention that our remand to the District Court in *United States* v. *Orito*, 413 U. S. 139 (1973), for reconsideration of the sufficiency of the indictment in light of *Miller* and *United States* v. *12 200-ft. Reels of Film*, indicates that the sufficiency of their indictment is in question misses the mark. In *Orito*, we reviewed a district court judgment which had dismissed an indictment under 18 U. S. C. § 1462 and held the statute unconstitutional. In upholding the statute and vacating the judgment of the District Court, we remanded the case for reconsideration of the indictment in light of *Miller* and *12 Reels*, which had, of course, enunciated new standards for state and federal obscenity prosecutions, and for reconsideration in light of our opinion overruling the District Court's holding that the statute was unconstitutional. Here of course, the District Court and the Court of Appeals have already upheld both the sufficiency of the indictment and the constitutionality of 18 U. S. C. § 1461, and we agree with their rulings.

Petitioners contend that this instruction was improper and that proof of scienter in obscenity prosecutions requires, "at the very least, proof both of knowledge of the contents of the material and awareness of the obscene character of the material." Brief for Pet. Kemp 31–32. In support of this contention, petitioners urge, as they must, that we overrule our prior decision in *Rosen* v. *United States*, 161 U. S. 29 (1896). We decline that invitation, and hold that the District Court in this case properly instructed the jury on the question of scienter.

In *Rosen* v. *United States*, *supra*, this Court was faced with the question of whether, under a forerunner statute to the present 18 U. S. C. § 1461, see Rev. Stat. § 3893, 19 Stat. 90 (1876), a charge of mailing obscene material must be supported by evidence that a defendant "knew or believed that such [material] could be properly or justly characterized as obscene. . . ." 161 U. S., at 41. The Court rejected this contention, stating:

> "The statute is not to be so interpreted. The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice at the time of its contents, the offence is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or the belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene,

> lewd, and lascivious was recognized as the test for determining whether the statute has been violated." 161 U. S., at 41–42.

Our subsequent cases have not retreated from this general rule, either as a matter of statutory or constitutional interpretation, nor have they purported to hold that the prosecution must prove a defendant's knowledge of the legal status of the materials he distributes.

In *Smith* v. *California*, 361 U. S. 147 (1959), this Court was faced with a challenge to the constitutionality of a Los Angeles ordinance which had been construed by the state courts as making the proprietor of a bookstore absolutely liable criminally for the mere possession in his store of a book later judicially determined to be obscene, even though he had no knowledge of the contents of the book. The Court held that the ordinance could not constitutionally eliminate altogether a scienter requirement, and that, in order to be constitutionally applied to a book distributor, it must be shown that he had "knowledge of the contents of the book." *Id.*, at 153. The Court further noted that "[w]e need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock." *Id.*, at 154.

Smith does not support petitioners' claim in this case, since it dealt with an ordinance which totally dispensed with any proof of scienter on the part of the distributor of obscene material. Nor did the Court's decision in *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478 (1962), also relied upon by petitioners, suggest otherwise. There Mr. Justice Harlan, for a plurality of the Court, recognizing that scienter was required for a criminal prosecution under 18 U. S. C. § 1461, rejected the Government's contention that such a requirement was unnecessary in an administrative determination by the Post Office Depart-

ment that certain materials were nonmailable under that section. The Court held that the obscene advertising proscription of the federal statute was not applicable in such an administrative determination unless the publisher of the materials knew that at least some of his advertisers were offering to sell obscene material. Such proof was deemed lacking by the Court, and therefore the publishers could not be administratively prohibited from mailing the publications.[13]

Significantly, a substantially similar claim to the instant one was rejected by this Court in *Mishkin* v. *New York*, 383 U. S. 502 (1966). In examining a New York statute, the Court there noted that the New York Court of Appeals had "authoritatively interpreted" the statutory provision to require the "vital element of scienter" and that it had defined the required mental element as follows:

> "A reading of the [New York] statute . . . as a whole clearly indicates that only those who are in some manner aware of the *character* of the material they attempt to distribute should be punished. It is not innocent but *calculated purveyance* of filth which is exorcised. . . ." *Id.*, at 510 (emphasis the Court's), quoting from *People* v. *Finkelstein*, 9 N. Y. 2d 342, 344–345, 174 N. E. 2d 470, 471 (1961).

The Court emphasized that this construction of the New York statute "foreclosed" the defendant's challenge to

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[13] MR. JUSTICE BRENNAN, joined by Mr. Chief Justice Warren and MR. JUSTICE DOUGLAS, concluded that 18 U. S. C. § 1461 does not authorize the Postmaster General to employ any administrative process of his own to close the mails to matter which, in his view, falls within the ban of that section. *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 495–519 (1962) (separate opinion).

the statute based on *Smith* v. *California*, *supra*, and stated:

> "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity. The New York definition of the scienter required by [the New York statute] amply serves those ends, and therefore fully meets the demands of the Constitution. Cf. *Roth* v. *United States*, 354 U. S., at 495–496 (WARREN, C. J., concurring)." 383 U. S., at 511.

The *Mishkin* holding was reaffirmed in *Ginsberg* v. *New York*, 390 U. S. 629 (1968). There the Court was again faced with the sufficiency of the scienter requirement of another New York statute, which proscribed the "knowing" distribution of obscene materials to minors. "Knowingly" was defined in the statute as "knowledge" of, or "reason to know" of the character and content of the material. Citing *Mishkin*, and the New York Court of Appeals' construction of the other similar statutory language, the Court rejected the challenge to the scienter provision.

We think the "knowingly" language of 18 U. S. C. § 1461, and the instructions given by the District Court in this case satisfied the constitutional requirements of scienter. It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributes, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement

is required neither by the language of 18 U. S. C. § 1461 or by the Constitution.

> "Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk." *United States* v. *Wurzbach*, 280 U. S. 396, 399 (1930).

Petitioners also make a broad attack on the sufficiency of the evidence. The general rule of application is that "[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." *Glasser* v. *United States*, 315 U. S. 60, 80 (1942). The primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals, which in this case held that the Government had satisfied its burden. We agree. Based on the evidence before it, the jury was entitled to conclude that the individual petitioners, as corporate officials directly concerned with the activities of their organizations, were aware of the mail solicitation scheme, and of the contents of the brochure. The evidence is likewise sufficient to establish the existence of a conspiracy to mail the obscene brochure. The existence of an agreement may be shown by circumstances indicating that criminal defendants acted in concert to achieve a common goal. See, *e. g.*, *Blumenthal* v. *United States*, 332 U. S. 539, 556–558 (1947).

III

We turn now to petitioners' attack on certain evidentiary rulings of the District Court. Petitioners have very much the laboring oar in showing that such rulings constitute reversible error, since "in judicial trials, the

whole tendency is to leave rulings as to the illuminating relevance of testimony largely to the discretion of the trial court that hears the evidence." *Labor Board* v. *Donnelly Co.*, 330 U. S. 219, 236 (1947); *Michelson* v. *United States*, 335 U. S. 469, 480 (1948); *Salem* v. *United States Lines Co.*, 370 U. S. 31, 35 (1962).

Petitioners offered in evidence at trial three categories of allegedly comparable materials argued to be relevant to community standards: (1) materials which had received second-class mailing privileges; (2) materials which had previously been the subject of litigation and had found to be "constitutionally protected"; and (3) materials openly available on the newsstands. The District Court, after examining the materials, refused to admit them into evidence on the grounds that "they tend to confuse the jury" and "would serve no probative value in comparison to the amount of confusion and deluge of material that could result therefrom." App. 158. The Court of Appeals concluded that the District Court was correct in rejecting the proffered evidence, stating that any abuse of discretion in refusing to admit the materials themselves had been "cured by the District Court's offer to entertain expert testimony with respect to the elements to be shown for the advice of the jury." 481 F. 2d, at 320. Here the District Court permitted four expert witnesses called by petitioners to testify extensively concerning the relevant community standards.

The defendant in an obscenity prosecution, just as a defendant in any other prosecution, is entitled to an opportunity to adduce relevant, competent evidence bearing on the issues to be tried. But the availability of similar materials on the newsstands of the community does not automatically make them admissible as tending to prove the nonobscenity of the materials with which the defendant is charged with circulating. As stated by the Court of Appeals, the mere fact that materials similar

to the brochure at issue here "are for sale and purchased at book stores around the country does not make them witnesses of virtue." 481 F. 2d, at 30. Or, as put by the Court of Appeals in *United States* v. *Manarite*, 448 F. 2d 583 (CA2 1971):

> "Mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities." *Id.*, at 593.

Nor do we think the District Court erred in refusing petitioners' offer of a magazine which had received a second-class mailing privilege.[14] While applicable federal law, see 39 U. S. C. § 4354 (1964 ed.), 39 CFR § 13.2 (1973), lays down certain standards for the issuance of a second-class mailing permit, this Court has held that these standards give postal inspectors no power of censorship. *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146 (1946). The mere fact that a publication has acquired a second-class mailing privilege does not therefore create any presumption that it is not obscene.

Finally, we do not think the District Court abused its discretion in refusing to admit certain allegedly comparable materials, a film and two magazines,[15] which had been found to be nonobscene by this Court. See *Pinkus* v. *Pitchess*, 429 F. 2d 416 (CA9), aff'd, *sub nom. California* v. *Pinkus*, 400 U. S. 922 (1970); *Burgin* v. *South Carolina*, 404 U. S. 806, rev'g 255 S. C. 237, 178 S. E. 2d 325 (1971). A judicial determination that particular matters are not obscene does not necessarily make them relevant to the determination of the obscenity of other materials, much less mandate their admission into evidence.

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[14] The magazine offered was entitled "Nude Living, No. 63." The foundation alleged for its admissibility was that it had received a second-class mailing privilege. App. 212–213.

[15] Brief for Pet. Kemp 69.

Much of the material offered by petitioners was not of demonstrated relevance to the issues in this case. Such of it that may have been clearly relevant was subject to the District Court's observation that it would tend to create more confusion than enlightenment in the minds of the jury, and to the court's expressed willingness to permit the same material to be treated in the testimony of expert witnesses. The District Court retains considerable latitude even with admittedly relevant evidence in rejecting that which is cumulative, and in requiring that which is to be brought to the jury's attention to be done so in a manner least likely to confuse that body. We agree with the Court of Appeals that the District Court's discretion was not abused.[16]

Petitioners second contention is that the District Court erred in instructing the jury as to the determination of the prurient appeal of the brochure. At the trial, the Government introduced, over petitioners' objection, testimony from an expert witness that the material in the Illustrated Report appealed to the prurient interest of various deviant sexual groups.[17] The testimony concerning the brochure was that it appealed to a prurient interest in general, and not specifically to some deviant group. Petitioners concede, however, that each of the

[16] Other proffered materials, alleged to be comparable, included numerous magazines and films, and also the survey conducted by the student at San Diego State University of the reactions of people in the San Diego area to the Illustrated Report and the brochure. Brief for Pet. Kemp 64–71.

[17] Petitioners also contend that this evidence was at variance with the Government's answer to their Bill of Particulars. Brief for Pet. Hamling 49–50. The Court of Appeals assumed, without deciding, that such evidence did constitute a variance, but concluded that "such variance was in no wise a surprise or prejudice to the defendants as their own expert opinion testimony interwove and covered the same field completely." 481 F. 2d, at 322. We agree with the Court of Appeals.

pictures said to appeal to deviant groups did in fact appear in the brochure.[18] The District Court accordingly instructed the jury that in deciding whether the predominant appeal of the Illustrated Report and the brochure was to a prurient interest in sex, it could consider whether some portions of those materials appealed to a prurient interest of a specifically defined deviant group as well as whether they appealed to the prurient interest of the average person. App. 239–241. The Court of Appeals found no error in the instruction, since it was "manifest that the District Court considered that some of the portrayals in the brochure might be found to have a prurient appeal" to a deviant group. 481 F. 2d, at 321.

Petitioners contend that the District Court's instruction was improper because it allowed the jury to measure the brochure by its appeal to the prurient interest not only of the average person but also of a clearly defined deviant group. Our decision in *Mishkin* v. *New York*, 383 U. S. 502 (1966), clearly indicates that in measuring the prurient appeal of allegedly obscene materials, i. e., whether the "dominant theme of the material taken as a whole appeals to a prurient interest in sex," consideration may be given to the prurient appeal of the material to clearly defined deviant sexual groups. Petitioners appear to argue that if some of the material appeals to the prurient interest of sexual deviants while other parts appeal to the prurient interest of the average person, a general finding that the material appeals to a prurient interest in sex is somehow precluded. But we stated in *Mishkin* v. *New York*:

> "Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if

[18] Brief for Pet. Hamling 49–50.

> the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the 'average' or 'normal' person in *Roth*, 354 U. S., at 489–490, does not foreclose this holding. . . . We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible-person facet of the [*Regina* v.] *Hicklin* [L. R. 3 Q. B. 360] test." 383 U. S., at 508–509 (footnotes omitted).

The District Court's instruction was consistent with this statement in *Mishkin*. The jury was instructed that it must find that the materials as a whole appealed generally to a prurient interest in sex. In making that determination, the jury was properly instructed that it should measure the prurient appeal of the materials as to all groups. Such an instruction was also consistent with our recent decision in *Miller* v. *California*, 413 U. S. 15 (1973), and the related cases. We stated in *Miller*:

> "As the Court made clear in *Mishkin* v. *New York*, 383 U. S., at 508–509, the primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, *so far as material is not aimed at a deviant group*, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one." 413 U. S., at 33 (emphasis added).

Finally, we similarly think petitioners' challenge to the pandering instruction given by the District Court is without merit. The District Court instructed the jury that they must apply the three-part test of the plurality opinion in *Memoirs* v. *Massachusetts*, 383 U. S., at 418, and then indicated that the jury could, in applying that test, if it found the case to be close, also consider whether the materials had been pandered, by looking to its "[m]anner of distribution, circumstances of production, sale, . . . advertising . . . . [and] editorial intent . . . ." App. 245. This instruction was given with respect to both the Illustrated Report and the brochure which advertised it, both of which were at issue in the trial.

Petitioners contend that the instruction was improper on the facts adduced below and that it caused them to be "convicted" of pandering. Pandering was not charged in the indictment of the petitioners, but it is not, of course, an element of the offense of mailing obscene matter under 18 U. S. C. § 1461. The District Court's instruction was clearly consistent with our decision in *Ginzburg* v. *United States*, 383 U. S. 463 (1966), which held that evidence of pandering could be relevant in the determination of the obscenity of the materials at issue, as long as the proper constitutional definition of obscenity is applied. Nor does the enactment by Congress of 39 U. S. C. § 3008, enabling the Postal Service to cease forwarding pandering advertisements at the request of an addressee, authorize, as contended by petitioners, the pandering of obscene advertisements. That statute simply gives a postal recipient the means to insulate himself from advertisements which offer for sale matter "which the addressee in his sole discretion believes to be erotically arousing or sexually provocative," by instructing the Post Office to order the sender to refrain from mailing any further advertisements to him. See

Rowan v. *United States Post Office Dept.*, 397 U. S. 728 (1970). The statute does not purport to authorize the mailing of legally obscene pandering advertisements, which continues to be proscribed by 18 U. S. C. § 1461. See 39 U. S. C. § 3011 (e).

IV

Petitioners' final contentions are directed at alleged procedural irregularities said to have occurred during the course of the trial.

They first contend that the District Court committed reversible error by denying their request to make additional objections to the court's instructions to the jury out of the presence of the jury. Prior to closing arguments and instruction to the jury the parties had made a record with respect to the instructions which the Court indicated it would give. After argument and instructions, but before the jury had retired, petitioners' counsel approached the bench and requested that the jury be excused in order that he might present further objections to the charge. The court declined to excuse the jury, saying:

> "You have made all the objections suitable that I can think of. I want to send this Jury out. If you want to make a statement, make a statement." App., 257.

Petitioners contend that the court's refusal to excuse the jury violated the provisions of Rule 30, Federal Rules of Criminal Procedure, and requires reversal. Rule 30 provides:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests

shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. *Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.*" (Emphasis added.)

Nothing in Rule 30 transfers from the District Court to counsel the function of deciding at what point in the trial, consistent with established practice, counsel shall be given the opportunity required by Rule 30 to make a record on the instructions given by the court. But when counsel at the close of the court's instruction to the jury indicates that he wishes to make objections of a kind which could not previously have been brought to the court's attention, he runs the risk of waiving a claim of error under the fourth sentence of the Rule unless the court indicates that it will permit such objections to be made after the jury retires. Since the court here asked counsel for comments, and did not indicate that it would permit objections which could not have been previously formulated to be made after the jury retired, we agree with the Court of Appeals that the District Court erred in refusing to permit such objections to be made out of the presence of the jury. We also agree with the Court of Appeals conclusion that such procedural error does not mandate reversal.

The courts of appeals have taken varying approaches to the question of when a failure to comply with the pro-

visions of Rule 30 constitutes reversible error.[19] Some appear to have applied a general rule that such a violation is not reversible error unless the defendant demonstrates that he has been prejudiced. *United States* v. *Hall*, 200 F. 2d 957 (CA2 1953); *United States* v. *Titus*, 221 F. 2d 571 (CA2), cert. denied, 350 U. S. 832 (1955); *United States* v. *Fernandez*, 456 F. 2d 638 (CA2 1972); *Hodges* v. *United States*, 234 F. 2d 281 (CA5 1957); *Sultan* v. *United States*, 249 F. 2d 385 (CA5 1957). Others appear to have adopted a rule whereby a violation is not reversible error where it affirmatively appears that the defendant was not prejudiced. *United States* v. *Schartner*, 426 F. 2d 470 (CA3 1970); *Lovely* v. *United States*, 169 F. 2d 386 (CA4 1948). At least one Court of Appeals appears to take the position that the failure to comply with Rule 30 is automatic grounds for reversal, regardless of attenuating circumstances. *Hall* v. *United States*, 378 F. 2d 349 (CA10 1967).

[19] Rule 51 of the Federal Rules of Civil Procedure states that "[o]pportunity shall be given to make the objection out of the hearing of the jury." Though the "out-of-the-presence-of-the-jury" language is not contained in the civil rule, the Advisory Committee's note attending Criminal Rule 30 states that it is to "correspond[s] to rule 51 of the Federal Rules of Civil Procedure. . . . It seemed appropriate that on a point such as instructions to juries there should be no difference in procedure between civil and ciriminal cases." The Government argues that in considering whether failure to comply with Criminal Rule 30 requires reversal, the appropriate test should be similar to the general standard of consideration where there is a failure to comply with Civil Rule 51, *i. e.*, reversal is required "if there is a reasonable basis for concluding that the colloquy held in the presence of the jury as a result of the judge's ignoring or denying a proper request was prejudicial." *Swain* v. *Boeing Airplane Co.*, 337 F. 2d 940, 943 (CA2 1964), cert. denied, 380 U. S. 951 (1965). This approach was used by a panel of the Court of Appeals for the Second Circuit in a case involving failure to comply with Criminal Rule 30. *United States* v. *Fernandez*, 456 F. 2d 638 (CA2 1972).

The Court of Appeals in this case felt that the rule announced by the Third Circuit in *United States* v. *Schartner, supra,* was the appropriate one for application where Rule 30 has not been complied with. The court in *Schartner* held that a District Court's failure to comply with the "out of presence of the jury" requirement of Rule 30, upon proper request by a party, constitutes reversible error "unless it be demonstrable on an examination of the whole record that the denial of the right did not prejudice" the defendant's case. *United States* v. *Schartner,* 426 F. 2d, at 480. Applying that rule, the Court of Appeals here concluded that there was no prejudice to any of the petitioners as a result of the District Court's failure to comply with Rule 30.

The language in Rule 30 at issue here was added to that rule by a 1966 amendment; prior to that time the rule had only provided that a party should be given the opportunity to make the objection out of the *hearing* of the jury. The significance of the change was not elaborated by the Advisory Committee in its note accompanying the rule, which merely mentioned the change. Courts examining the rule have found that it is principally designed to avoid the subtle psychological pressures upon the jurors which would arise if they were to view and hear defense counsel in a posture of apparent antagonism toward the judge. *Lovely* v. *United States, supra,* at 391; *Hodges* v. *United States, supra,* at 283–284; *United States* v. *Schartner, supra,* at 479. While that goal might be served in many cases by a sufficiently low-tone bench conference, the ultimate way to assure the goal is to comply with the Rule.

Petitioners urge that we adopt a strict approach and declare that any noncompliance with the Rule requires reversal. We think such an approach would be unduly mechanical, and would be inconsistent with interpretation

in pari materia of Rule 30 and other relevant provisions of the Federal Rules of Criminal Procedure, since Rule 52 (a) specifically provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." This provision suggests the soundness of an approach similar to that of the Court of Appeals here and the various other Courts of Appeals, *supra*, which have in some manner examined the prejudice to the defendant in deciding whether reversal is required where there is a failure to comply with Rule 30.

We conclude that the Court of Appeals did not err in refusing to reverse petitioners' convictions for the failure to comply with the provisions of Rule 30. The Court of Appeals felt that it should apply the somewhat stricter test of the *Schartner* case, *supra;* the court felt that "the rule of *Fernandez, supra* [456 F. 2d 638, CA2], places a burden upon a defendant in a criminal case that he may not be able to carry." 481 F. 2d, at 324. Applying the *Schartner* test, the Court of Appeals determined that there was no prejudice to petitioners from the failure to hold the instruction-objection session out of the presence of the jury. Our independent examination of that bench conference convinces us that the holding of the Court of Appeals was correct. The bench conference was one of many at the trial and there is no indication in the record that the discussion was heard by the jury. The colloquy between petitioners' counsel and the court concerned purely legal issues, App. 257–265, and the District Court had prior to that point indicated its rulings with respect to the instructions requested by counsel. We express no view, of course, as to whether a court of appeals may follow the apparently more lenient standard of requiring the defendant to demonstrate that he was prejudiced. See *United States* v. *Fernandez*, 456 F. 2d 638, 643–644 (CA2 1972).

Petitioners' second procedural contention is that the trial jury was improperly constituted because an allegedly cognizable class of citizens, "young adults," which petitioners define as those between the ages of 18 and 24 years, were systematically excluded.[20] Petitioners therefore argue that the District Court abused its discretion in refusing to grant a continuance until a new jury, which would have presumably contained a greater ratio of young persons, was drawn.

At the time of petitioners' indictment and trial, the jury selection plan of the Southern District of California, adopted pursuant to 28 U. S. C. §§ 1863 (b)(2), 1863 (b)(4) (1968 ed.), 82 Stat. 55 (1968), provided for the periodic emptying and refilling of the master jury wheel from voter registration lists. At that point, it had been slightly less than four years since the jury wheel in the District had last been filled. Petitioners' argument is that because the jury wheel had last been filled in 1968, the youngest potential juror for their trial was at least 24 years old. The petitioner called as a witness the Clerk of the Southern District of California, who testified that within one month the master wheel would be refilled with the persons who then appeared on the voters' registration list and that the master list would then contain the names of persons 21 years of age and over. R. T. 94–98. A 1972 amendment to 28 U. S. C. § 1863 (b)(4) provided that the periodic emptying and refilling of the master wheel should occur at specified intervals, "not to exceed four years." Pub. L. No. 92–269, § 2, 86 Stat. 117 (1972). The District Court denied petitioners' mo-

[20] In connection with their motion to stike the venire, petitioners introduced evidence which they contended established that "young persons were a cognizable group and that they were more tolerant than older persons in matters pertaining to the depiction of sexually explicit material." Brief for Pet. Hamling 88.

tion to strike the venire, but stated that the evidence presented indicated that "it is time to change the jury master wheel." R. T. 93. The petitioners then moved for a continuance of approximately one month, so that their jury would be drawn from a master wheel that included persons 21 years of age or over. R. T. 95–98. The District Court denied the motion.

The Court of Appeals assumed, without deciding, that the young do constitute a cognizable group or class, but concluded that petitioners had "failed to show, let alone establish, a purposeful systematic exclusion of the members of that class whose names, but for such systematic exclusion would otherwise be selected for the master jury wheel," and therefore that the District Court's refusal to grant a continuance was not an abuse of discretion. 481 F. 2d, at 314. We agree with the Court of Appeals.

Petitioners do not cite case authority for the proposition that the young are an identifiable group entitled to a group-based protection under our prior cases, see *Hernandez* v. *Texas*, 347 U. S. 475, 479–480 (1954); claims of exclusion of the young from juries have met with little success in the federal courts.[21] Assuming, as did the Court of Appeals, that the young are such a group, we do not believe that there is evidence in this case sufficient to make out a prima facie case of discrimination which would in turn place the burden on the Government to overcome it. The master wheel under the Southern District of California plan, as under plans in other judicial districts, is periodically emptied and then refilled with names from the available voter lists. Persons added to

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[21] See, *e. g.*, *United States* v. *Butera*, 420 F. 2d 564 (CA1 1970); *United States* v. *Camara*, 451 F. 2d 1122 (CA1 1971); *United States* v. *Gooding*, 473 F. 2d 425 (CA5 1973); *United States* v. *Kuhn*, 441 F. 2d 179 (CA5 1971); *United States* v. *Gast*, 457 F. 2d 141 (CA7), cert. denied, 406 U. S. 969 (1972).

the voter lists subsequent to one filling of the jury wheel are therefore not added to the wheel until the next refilling. But some play in the joints of the jury selection process is necessary in order to accommodate the practical problems of judicial administration. Congress could reasonably adopt procedures which, while designed to assure that "an impartial jury is drawn from a cross-section of the community," *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220 (1946); *Smith* v. *Texas*, 311 U. S. 128, 130 (1940), at the same time take into account practical problems in judicial administration. Unless we were to require the daily refilling of the jury wheel, Congress may necessarily conclude that some periodic delay in updating the wheel is reasonable to permit the orderly administration of justice.[22] Invariably of course, as time goes on, the jury wheel will be more and more out of date, especially near the end of the statutorily prescribed time period for updating the wheel. But if the jury wheel is not discriminatory when completely updated at the time of each refilling, a prohibited "purposeful discrimination" does not arise near the end of the period simply because the young and other persons have belatedly become eligible for jury service by becoming registered voters. *Whitus* v. *Georgia*, 385 U. S. 545, 551 (1967); see *Avery* v. *Georgia*, 345 U. S. 559 (1953); *Alexander* v. *Louisiana*, 405 U. S. 625 (1972). Since petitioners failed to establish a discriminatory exclusion of the young from their jury, the District Court properly exercised its discretion in refusing to grant petitioners' motion for a continuance.

[22] Various delays in refilling jury wheels have been upheld by the federal courts. *E. g.*, *United States* v. *Pentado*, 463 F. 2d 355 (CA5 1972) (three years); *United States* v. *Gooding*, 473 F. 2d 425 (CA5 1973) (three years, four months); *United States* v. *Kuhn*, 441 F. 2d 179 (CA5 1971) (five years).

Petitioners' third procedural contention is that the District Court erred in refusing to ask certain questions on *voir dire* concerning possible religious and other biases of the jurors.[23] Specifically, petitioners requested the court to ask questions as to whether the jurors' educational, political, and religious beliefs might affect their views on the question of obscenity. App. 78–81. The Court of Appeals concluded that the District Court's examination on the *voir dire* of the prospective jurors "was full, complete and . . . fair to the [petitioners] as contemplated by Rule 24 (a), Federal Rules of Criminal Procedure." 481 F. 2d, at 314. Noting that petitioners had requested the submission of numerous questions to the petit panel, the Court of Appeals stated:

> "The District Court asked many of the questions as submitted, many in altered and consolidated form, and declined to ask many others which were cumulative and argumentative. The handling of those questions not asked was clearly within the range of the District Court's discretion in the matter and no clear abuse of the discretion nor prejudice to the [petitioners] has been shown." *Ibid.*

We agree with the Court of Appeals. Rule 24 (a) of the Federal Rules of Criminal Procedure permits a dis-

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[23] Petitioners also contend that certain actions of the Government's attorney before the grand jury prejudiced that body against them. The Court of Appeals, in rejecting this contention, stated:

"The record before us is totally lacking of any evidence or showing of any kind that any member of the Grand Jury was biased or prejudiced in any degree against any of the [petitioners], except only a supposition as to how the members may have reacted upon a view of the Brochure and Report. The presumption of regularity which attaches to Grand Jury proceedings still abides. . . . [T]he assignment has no merit." 481 F. 2d, at 313 (citations omitted).

We agree with the Court of Appeals.

trict court to conduct the *voir dire* examination, making such use of questions submitted by the parties as it deems proper. The District Court here asked questions similar to many of those submitted by petitioners, and its examination was clearly sufficient to test the qualifications and competency of the prospective jurors. Petitioners' reliance on this Court's decisions in *Aldridge* v. *United States*, 283 U. S. 308 (1931), and *Ham* v. *South Carolina*, 409 U. S. 524 (1973), is misplaced. Those cases held that in certain situations a judge must inquire into possible racial prejudices of the jurors in order to satisfy the demands of due process. But in *Ham* v. *South Carolina*, *supra*, we also rejected a claim that the trial judge had erred in refusing to ask the jurors about potential bias against beards, noting our inability "to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices. . . ." 409 U. S., at 528. Here, as in *Ham*, the trial judge made a general inquiry into the jurors' general views concerning obscenity. Failure to ask specific questions as to the possible effect of educational, political, and religious biases did "not reach the level of a constitutional violation," *Ham* v. *South Carolina*, 409 U. S., at 528, nor was it error requiring the exercise of our supervisory authority over the administration of justice in the federal courts. We hold that the District Court acted within its discretion in refusing to ask the questions.

The judgment of the Court of Appeals for the Ninth Circuit in this case is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 73–507

William L. Hamling et al., Petitioners, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 24, 1974]

MR. JUSTICE DOUGLAS, dissenting.

In 1970 the President's Commission on Obscenity and Pornography issued its Report. Dean William D. Lockhart was Chairman. Eighteen others were members. It was a 646 page report. One member, Charles H. Keating, Jr., filed a dissenting report of some 60 pages with at least as many pages comprised of exhibits. The report contains many references to many facets of sex: *e. g.*, petting, coitus, oral sexuality, masturbation, and homosexual activities.

What petitioners did was to supply the Report with a glossary—not in dictionary terms but visually. Every item in the glossary depicted explicit sexual material within the meaning of that term as used in the Report. Perhaps we should have no Reports on Obscenity. But imbedded in the First Amendment is the philosophy that the people have the right to know.* Sex is more impor-

*The Constitution of India (March 1, 1963) provides in Art. 19 (1) that "All citizens shall have the right—(a) to freedom of speech and opinion"; but Art. 19 (2) provides that nothing in that clause bars "reasonable restrictions in the exercise" of those rights "in the interests of . . . decency or morality." Our First Amendment contains no such qualification and certainly when Jefferson and Madison drafted it sex had as great a potential for vulgarity as for beauty. If they had wanted a federal censor to edit our publications, they certainly would have made it explicit.

tant to some than to others but it is of some importance to all. If officials may constitutionally report on obscenity, I see nothing in the First Amendment that allow us to bar the use of a glossary factually to illustrate what the Report discusses.

SUPREME COURT OF THE UNITED STATES

No. 73–507

William L. Hamling et al., Petitioners, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 24, 1974]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

I

Whatever the constitutional power of government to *regulate* the distribution of sexually oriented materials, the First and Fourteenth Amendments, in my view, deny the Federal and State Governments power wholly to *suppress* their distribution. For I remain of the view that, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). Since amended 18 U. S. C. § 1461, as construed by the Court, aims at total *suppression* of distribution by mail of sexually oriented materials, it is, in my view, unconstitutionally overbroad and therefore invalid on its face. On that ground alone, I would reverse the judgment of the Court of Appeals and direct the dismissal of the indictment. Several other reasons, however, also compel the conclusion that petitioners' convictions should be set aside.

II

At least since 1962 the accepted construction of amended § 1461 has been that of Mr. Justice Harlan and Mr. Justice Stewart "that the proper test under this federal statute, [§ 1461], reaching as it does all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency"; further, they said, "[t]he 1958 amendments . . . authorizing criminal prosecution at the place of delivery evince no purpose to make the standard less than national." *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 488 & n. 10. The Court today overrules that construction and construes amended § 1461 to permit a juror to "draw on the knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." *Ante*, p. 15. Apart from the questions whether the Court's new construction trespasses upon the congressional prerogative, see *Blount* v. *Rizzi*, 400 U. S. 410, 419 (1971),[1] and

[1] The Court is, of course, obliged to strain to construe congressional enactments to avoid constitutional attacks. It cannot, however, emasculate a statute to avoid a perceived constitutional difficulty, see *Aptheker* v. *Secretary of State*, 378 U. S. 500, 515 (1964); *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379 (1933). The legislative history of § 1461 gives not the slightest indication that the application of local standards was contemplated. Indeed, the remarks of an early sponsor of the provision indicate that application of a national standard was intended:

"If there be a trial in this country or anywhere else of an obscene character—of that character that a report of it would corrupt the morals of the youth and the *morals of the country generally*—then I do not think the United States should provide the means to circulate that kind of literature in whatever paper or in whatever book it may be published." 4 Cong. Rec. 696 (1876) (remarks of Rep. Cannon) (emphasis added).

whether constitutionally any "local" standard under amended § 1461 can properly be employed to delineate the area of expression protected by the First Amendment, see *Pennekamp* v. *Florida*, 328 U. S. 331, 335 (1946)—since "It is, after all, a national Constitution we are expounding," *Jacobellis* v. *Ohio*, 378 U. S. 184, 195 (1964) (opinion of BRENNAN, J.)—the construction that a "local" standard applies in § 1461 cases raises at least another serious First Amendment problem.

The 1958 amendments to § 1461 constituted the mailing of obscene matter a continuing offense under 18 U. S. C. § 3237.[2] The practical effect of this amendment—intentionally adopted by Congress for that express purpose—is to permit prosecution "in the Federal district in which [the disseminator] . . . mailed the obscenity, in the Federal district in which the obscenity was received, or in any Federal district through which the obscenity passed while it was on its route through the mails." 104 Cong. Rec. 15610–15611 (1958) (remarks of Rep. Hillings); see H. R. Rep. No. 2624, 85th Cong., 2d Sess. (1958); 104 Cong. Rec. 8991 (remarks of Sen. Keating); *id.*, at 17832; *id.*, at 8992 (remarks of Sen. Poff). Under today's "local" standards construction, therefore, the

[2] Prior to the amendment § 1461 read, "[w]hoever knowingly *deposits* for mailing or delivery . . . ." (emphasis added). This was changed to read "[w]hoever knowingly *uses the mails* . . . ." The amendment overruled *United States* v. *Ross*, 205 F. 2d 619 (1953), which held that the unlawful act proscribed in § 1461 was "the deposit for mailing and not a use of the mails which may follow such deposit," *id.*, at 621, and thus brought §1461 within 18 U. S. C. § 3237, which provides in relevant part that "[a]ny offense involving the use of mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail moves." See generally Note, Venue: Its Impact on Obscenity, 11 S. Dak. L. Rev. 363 (1966).

guilt or innocence of distributors of identical materials mailed from the same locale can now turn on the dicey course of transit or place of delivery of the materials. See *United States* v. *Palladino*, 490 F. 2d 499, 503 (1973) (Coffin, C. J.). National distributors choosing to send their products in interstate travels will be forced to cope with the community standards of every hamlet into which their goods may wander. Because these variegated standards are impossible to discern, national distributors, fearful of risking the expense and difficulty of defending against prosecution in any of several remote communities, must inevitably be led to retreat to debilitating self-censorship that abridges the First Amendment rights of the people. For it "would tend to restrict the public's access to forms [of sexually oriented materials] which the [United States] could not constitutionally suppress directly . . . a censorship . . . hardly less virulent for being privately administered . . . [for] . . . [t]hrough it, the distribution of all [sexually oriented materials], both obscene and not obscene, would be impeded." *Smith* v. *California*, 361 U. S. 147, 154 (1959). Thus, the people of many communities will be "protected" far beyond government's constitutional power to deny them access to sexually oriented materials. A construction that has such consequences necessarily renders the constitutionality of amended § 1461 facially suspect under the First Amendment.

III

But even on the assumption that amended § 1461 is invulnerable to constitutional attack, the Court's affirmance of these convictions is a patently indefensible denial to these petitioners of due process of law. The trial judge followed the *Manual Enterprise*'s construction of amended § 1461 that required a determination of guilt upon the basis of a "national" standard of decency. The

Court holds that under today's new "local" standards construction, this was error. Yet, says the Court, the error in effect was harmless because the references in the instructions to "national" standards could not have "materially affected [the jurors'] deliberations . . . ." *Ante*, p. 18. The trial transcript lays bare the utter fallacy of that conclusion.

First, the Court appraises the trial court's references to "national" standards as "isolated," and cites *Boyd* v. *United States*, 271 U. S. 104, 107 (1926), *ante*, p. 17, where the Court held that an ambiguous statement in a charge in a criminal case, which, interpreted one way, would be erroneous, but which considered with the charge as a whole, probably was understood by the jurors in a harmless sense, is not a ground for reversal. But to represent the references to "national" standards in the court's instructions as "isolated," and probably understood by the jury in a harmless sense, is completely to misread the instructions. The emphasis on "national" standards is the very core of the instructions, because the trial judge made "national" standards the central criterion of the determination of the obscenity of the brochure. He referred to "national" standards in his instructions no less than 18 times, 14 of them within the space of four transcript pages.[3] Indeed, his emphasis made such an

[3] The portion of the instructions containing the 14 references is as follows:

"Now, as to the second test, another requirement to be applied in determining whether the material in evidence is obscene, is whether the material is patently offensive in that it goes substantially beyond what is reasonably accepted according to the contemporary standards of the community as a whole, *the national community as a whole*. In applying this test you must consider each book or advertisement as a whole and not part by part. You must measure the material by contemporary or current *national community* standards and determine whether the material so exceeds the customary limits of candor in the descriptions and representa-

impression upon the jurors' minds that they returned from the jury room and requested that the trial judge reread them this portion of the instructions. See Tr., pp. 4989–4990.[4]

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tions of sex and nudity which are reasonably acceptable in the *national community* that they are patently offensive.

"Contemporary community standards means the standards generally held *throughout this country* concerning sex and matters pertaining to sex. The phrase means, as it has been aptly stated, the average conscience of the time, and the present critical point in the compromise between candor and shame, at which the community may have arrived here and now.

"You are the sole judges of the contemporary community *standards of this country*. In arriving at and applying your judgment, however, you are not to consider your own standards. That is, of what is good or what is bad. You are not to condemn by your own standards, if you know and believe them to be stricter than those generally held, and you are not to exculpate or excuse by your own standards, if you know and believe them to be more tolerant than those that are generally held. You are not to limit yourself to what you have learned while residing in your present locality or what you have learned or observed from and about people residing in your present locality. Rather, you are to call upon everything you have learned, seen, read, and observed from both the evidence presented at the trial and the experience you have gained from your own observations and experience in your affairs of life.

"If you find the materials in evidence to substantially exceed the limits of candor in the descriptions and representations of sex which are acceptable in the *national community*, then you may find the material to be patently offensive.

"You will note that the book and advertisement here involved cannot be found to be obscene unless the evidence shows beyond a reasonable doubt that these materials substantially exceed customary limits of candor in *the nation as a whole* in the description and representation of sex and nudity.

"The word 'substantially' has been defined as greatly or considerably, or largely. The contemporary community *standards of the nation*, are set by what is, in fact, reasonably accepted by the *national community as a whole*. That is to say, by society at large

[*Footnote 4 is on p. 7*]

Of at least as much if not more significance, the trial judge's refusal to permit the defense to offer proof of "local" standards evidences how utterly mistaken is the Court's surmise that the emphasis upon "national" standards in the instructions could not have "materially affected" the deliberations of the jurors. Virginia Carlsen was offered as a defense witness. Trial was in the Southern District of California which covers San Diego and Imperial Counties. Ms. Carlsen testified that, under the supervision of a professor at San Diego State University, she polled San Diego residents to ascertain their reaction to the brochure. The trial judge refused to admit the results of her survey in evidence, despite a side bar offer of proof that it would demonstrate that a substantial

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or people in general *throughout the nation*, and not by what some persons or groups of persons may believe *the national community* as a whole ought to accept or refuse to accept. It is a matter of common knowledge of which the Court takes judicial notice, that the customs change and that *the national community as a whole* may, from time to time, find acceptable that which was formerly unacceptable.

"Now, in determining and applying contemporary *national community standards*, you must consider what appears generally in magazines, books, newspapers, television, burlesque, night clubs, novels, motion pictures, the stage, and other media of communications in *the nation as a whole*, insofar as social value is concerned." Tr., pp. 4948–4951.

Four additional references to national standards appear at pages 4945, 4953, and 4960 of the trial transcript.

[4] Petitioners' failure to object to the national standards instructions can hardly be used to shift to their shoulders any burden of demonstrating prejudice. See *O'Connor* v. *Ohio*, 385 U. S. 92 (1966). The Court's reliance upon *Namet* v. *United States*, 373 U. S. 179, 190–191 (1963), and *Lopez* v. *United States*, 373 U. S. 427, 436 (1963), cases in which defendants failed to object to instructions which were erroneous at the time the jury was instructed and in which the defendants were therefore required to demonstrate that the instructions constituted "plain error," are thus inapt.

majority of the 718 persons interviewed had expressed the view that the brochure should be generally available to the public. Significantly, the survey was excluded by the trial judge *solely* on the ground that "[y]ou can't use a piece of a standard as the standard," thus emphasizing that guilt was to be predicated on violation of a national standard, or not at all. The colloquy at side bar was as follows:

> "Mr. Katz. . . . The questions on the survey I think are self-explanatory. She showed people the Illustrated Report; she showed people the survey—I mean the advertisement in the questionnaire, and recorded their responses and calculated them on the basis of sex and on the basis of age, and I think the jury should be entitled, your Honor, to use this as one of the tests they use in deciding what is community standards and what weight should be given to it is a question for the jury.
>
> "THE COURT. Well, I don't agree with you, Mr. Katz, at all.
>
> "I think you have a *national standard* here. You are going to have to stay with your *national standard.*
>
> "I think it does go to the admissibility. *You can't use a piece of a standard as the standard. If that were true, you would defeat the entire general standard.*
>
> "So I am not going to permit you to go any further with this witness with respect to this.
>
> . . . . .
>
> "Mr. Fleischman. . . . I think whatever limitations your Honor would put on it would be correct, but I think it would be and should be admitted for whatever weight it has.
>
> "THE COURT. *No. It is a national standard*

and I don't think this is the proper way to go about determining the national standard."

The affirmance of petitioners' convictions in these circumstances plainly denies petitioners due process of law in violation of the principle of *Saunders* v. *Shaw*, 244 U. S. 317 (1917). There, the plaintiff sought to enjoin collection of a drainage tax. At trial, the trial judge ruled inadmissible plaintiff's evidence that his land would not benefit from certain drainage improvements. Defendant therefore offered no proof that the plaintiff's lands would benefit and prevailed at trial. The State Supreme Court reversed and granted a permanent injunction against tax upon finding from the answer and testimony before it that the land had not been, and could not be, benefited. We reversed, holding that it was a violation of due process of law for a State Supreme Court to reverse a case and render judgment absolute, against a defendant who succeeded in the trial court, upon a proposition of fact that was ruled to be immaterial at the trial and concerning which the defendant had therefore no occasion and no proper opportunity to introduce rebuttal evidence.

Petitioners situation in this case is identical with that of the defendant in *Saunders*. Petitioners, too, were denied at trial admission of evidence upon a proposition of fact that was ruled immaterial and concerning which they therefore had no proper opportunity to introduce their proof. Had petitioners been aware that the proper criterion was the "local" standard, not only were they prepared to offer proof of the "local" standard, but obviously the strategy of their defense would have been completely different. To affirm their convictions without affording them opportunity to try the case on the "local" standards basis is a clear denial of due process. *Saunders* was, of course, a civil case. But the principle

there announced surely has even greater application where, as here, criminal convictions carrying long prison sentences are involved.

> "The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause . . . . And . . . this right becomes particularly fundamental when the proceeding allegedly results in a finding that a particular individual was guilty of a crime." *Jenkins* v. *McKeithen*, 395 U. S. 411, 429 (1969) (opinion of MARSHALL, J.).

But in addition to the palpable absurdity of the Court's surmises that introduction of the San Diego study could not have affected the jurors' deliberations, and that petitioners would not have introduced additional evidence or done anything materially different had they known the jurors would be instructed on local standards, the Court's assertion that the jurors could not have ruled differently if instructed to apply local, not national, standards evinces a claim of omniscience hardly mortal. It is the more remarkable in light of the contrary supposition of *Miller* v. *California*, 413 U. S. 15 (1973), that a jury instructed to apply national standards could indeed reach a different conclusion from that it might if instructed to apply local standards:

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. . . . People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." 413 U. S., at 32–33.

Indeed, *Miller* rejected the "national" standards test on the ground, *inter alia*, that a "local" standard would

allow a given community to apply a more permissive test:

> "The use of 'national' standards . . . necessarily implies that materials found tolerable in some places, but not under the 'national' criteria, will nevertheless be unavailable where they are acceptable." *Id.*, at 32 n. 13.

Yet for the purpose of affirming these convictions the Court holds in effect that the local standards of jurors drawn from the Southern District of California could not possibly be more permissive than those of the Nation as a whole.[5]

The Court's affirmance, in addition to denying due process in its refusal to apply the *Saunders* principle, also denies petitioners due process in another way. It is abundantly clear that petitioners' convictions are sustained upon a charge wholly different from that upon which they were tried. They were tried upon a charge of violating "national" standards and their convictions are affirmed as if they were tried for violating "local" standards. Under the law long settled by our cases, treating a conviction as a conviction upon a charge not made is a denial of due process of law. *Cole* v. *Arkansas*, 333 U. S. 196 (1948); *Eaton* v. *Tulsa*, — U. S. — (1974). A distaste, however strong, for commercial vendors of alleged pornography is no justification for deny-

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[5] It may be that the Court's unarticulated assumption is that jurors instructed to apply "national" standards will inevitably apply the standards of their local community, because national standards are simply "unascertainable." But to say that it may be difficult or even impossible to determine national standards is a far cry from saying that the jurors—instructed that it is their solemn duty to apply the law as pronounced by the Court—would not attempt to do so; or, indeed, that they would not reach a conclusion that the national standard differed from that of their local community.

ing petitioners the application of the principle imposed upon the courts of Arkansas and Oklahoma in those cases. Ours may be the final voice, but that is the greater reason for meticulous discharge of our responsibility to dispense evenhanded justice. The least to which petitioners are entitled is vacation of their convictions and a remand for a new trial.

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-507

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, and LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

The petitioners respectfully present this petition for a rehearing, based upon the grounds which follow hereinafter.

A.

1. There is no dispute that the prosecution and convictions of the petitioners here took place before this Court's decision in *Miller v. California,* 413 U.S.15, and the related cases. The government, in its brief and argument, conceded that petitioners had been "caught in a period of transition". *United States v. Palladino,* 490 F.2d 499, 500 (1 Cir. 1974). Petitioners were "convicted in what may be called a no man's land". *United States v. New Orleans Bookmart, Inc.,*

et al., 490 F.2d 73, 75 (5 Cir. 1974). Indeed, the majority opinion in this case states: "The principal question presented by this case is what rules of law shall govern obscenity convictions had prior to the date on which this Court's decision in *Miller v. California, supra,* and its companion cases were handed down, but which had not at that point become final." [Slip Op. 8].

A sharply divided Court has affirmed judgments of conviction which include sentences of imprisonment of four years and three years. The majority opinion states that while the *Miller* holdings rejected the view that the First Amendment requires that the proscription of obscenity be based on uniform nationwide standards of what is obscene, such standards being described as "hypothetical and unascertainable" [Slip Op. 14], still, the contention that prior convictions thereunder were rendered constitutionally impermissible was evidence of "a misunderstanding" of the *Miller* holdings [Slip Op. 14]. It is also plain from the majority opinion that 18 U.S.C. §1461 has never contained in its language the specific types of sexual conduct referred to in *Miller* and, indeed, the majority opinion for the first time purports to read the specific language into the federal statute [Slip Op. 24]. It is argued, however, that petitioners cannot complain with respect to the vagueness and overbreadth of the federal obscenity statute prior to *Miller* because the law had been "authoritatively construed" in *Manual Enterprises, Inc. v. Day,* 370 U.S.478 (1962), although the language quoted from the *Manual* opinion contains none of the specific sexual conduct described in *Miller,* and the *Manual* judgment itself upheld the nonobscenity of the material involved. 370 U.S. at 489-490 and

n.13. Finally, although *Miller* described the "utterly without redeeming social value" test as "unworkable", and rejected as a constitutional standard the "ambiguous" concept of "social importance", the majority opinion in this case concludes that *Miller* did not hold the third part of the *Memoirs* test to be unconstitutionally vague, but only a "departure from the definition of obscenity in *Roth*" [Slip Op. 26].

If a trial in a federal prosecution in a federal court depends on proof beyond a reasonable doubt of the essential elements of an offense, which elements are described by the highest court of the land as "hypothetical", "unascertainable", "abstract", "unrealistic", an "exercise in futility", "unworkable", "ambiguous" and without "any meaning at all", then, with all due deference, if the judgments of conviction rendered thereunder are not unconstitutional, they at least plainly do not satisfy the appearance of justice. In addition, when the record upon which the judgments of conviction rest are concededly marked by a cumulation of errors, and when three Justices of the Supreme Court of the United States (and probably a fourth who did not reach the issue) state that at least some of these errors constituted a denial of due process of law in the most fundamental sense, then "fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted". *Communist Party v. S.A.C.B.*, 351 U.S.115, 124.

2. This Court has the responsibility to supervise the administration of criminal justice by the federal judiciary. This includes the duty to see that the laws

are enforced by fair proceedings. The petitioners invoke this supervisory jurisdiction in the case herein. As was stated in *McNabb v. United States,* 318 U.S. 332, 340-341:

> ". . . the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reasons which are summarized as 'due process of law' and below which we reach what is really trial by force . . . Considerations of large policy in making the necessary accommodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts."

See also, *Saldana v. United States,* 365 U.S.646, 647 (sentence "not consistent with that regularity and fairness which should characterize the administration of criminal justice in the federal courts"); *Elkins v. United States,* 364 U.S.206, 216 (silver platter doctrine abandoned upon invocation of "the Court's supervisory power over the administration of criminal justice in the federal courts"); *Marshall v. United States,* 360 U.S.310, 313 (exposure of jurors during trial to newspaper articles entitles accused to a new trial "in the exercise of our supervisory power to formulate and apply proper standards for enforcement of the

criminal law in the federal courts"); *Yates v. United States*, 356 U.S.363, 366-367 (sentence of district court in contempt action set aside in the exercise of the Supreme Court's "supervisory power over the administration of justice in the lower federal courts"); *Grunewald v. United States*, 353 U.S.391, 423-424 (danger that jury might make impermissible use of an alleged prior inconsistent statement admitted into evidence on the question of credibility justifies grant of a new trial under "our supervisory power over the administration of federal criminal justice"); *McCarthy v. United States*, 394 U.S.459, 464 (failure by the district judge to comply with F.R.Cr.P., Rule 11, results in reversal and remand "pursuant to our supervisory power over the lower federal courts"); *Offutt v. United States*, 348 U.S.11, 14 ("Therefore, justice must satisfy the appearance of justice.").

In the discussion which follows, petitioners do not retrace constitutional and legal arguments presented in their briefs and argument to this Court. Petitioners do earnestly urge each Justice of the Court who joined in the majority opinion to reconsider the ruling in the light of the fundamental principles of fairness in the administration of justice in the federal courts which the Court itself has unequivocally enunciated in the past. In invoking the supervisory jurisdiction of this Court, the petitioners bleieve that an analysis of the majority opinion will reveal a need for a modification of the judgment of affirmance to one of reversal and remand. Petitioners' sole request is the opportunity for a trial before a jury of their peers based upon fair and delineated standards of law and procedure, devoid of the tangled and complex issues which arose in the transition from *Memoirs* to *Miller* to *Hamling*.

3. The majority opinion concludes that while the trial court's erroneous instructions referred only to national standards, still the convictions of petitioners were not rendered void as a matter of constitutional law. "Whether petitioners were materially prejudiced by those references is a different question." [Slip. Op. 17]. Before discussing the question of "harmless error" thus projected by the opinion, petitioners submit that the majority opinion overlooks the significance of the record in this respect. The issue presented to the Court involves not only instructions by the trial judge, but the nature of the specific charge made against these petitioners in the indictment and the entire theory of the case which was the sole focus of the evidence presented by the government and petitioners, and emphasized and re-emphasized by the trial judge to the jury.

Prior to trial, on a motion for a bill of particulars which requested the government to state what the petitioners were charged with under the word "obscene" in the indictment (J.A. 35-58), the government replied: "Insofar as Counts 2 through 14 are concerned, implicit in an allegation of obscenity as to the advertisements named therein is the allegation that said advertisements go substantially beyond customary limits of candor in the nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion." (J.A. 46). There can be no doubt that the petitioners here were charged by the indictment, as amplified by the bill of particulars, with mailing a brochure which violated the standards of the nation as a whole, yet their convictions have been affirmed on the basis that the brochure offended the standards of the judicial district in the Southern District of California, a legal standard which was not in existence at

the time petitioners were tried and which was never given to the jury as the applicable law. Plainly, such a result is contrary to principles enunciated by this Court in *Rabe v. Washington*, 405 U.S.313; *DeJonge v. Oregon*, 299 U.S.353; and *Cole v. Arkansas*, 333 U.S. 196.

Mr. Justice Brennan, in his dissenting opinion, has demonstrated the insistence by the trial judge that the case be tried solely on the basis of national standards [Slip Op. 5-7, n.3]. The question here, therefore, is not whether jury instructions are to be "judged as a whole, rather than by picking isolated phrases from them" [Slip Op. 17]. Taking the instructions as a whole and reading every word of the instructions from beginning to end, there is never a doubt that the jury was told to consider the evidence only with respect to the standards of the nation as a whole. Nevertheless, the majority opinion holds that reversal is required only where there is a probability that "the excision" of the instructions with respect to national standards would have "materially affected the deliberations of the jury" [Slip. Op. 18]. If the instructions with respect to national standards are "excised", the error would be palpable because there would be no instructions to the jury on community standards at all. This is not a case where the trial judge instructed on both national and local standards and where it is contended that the jury might have selected national instead of local standards. This is a case where the jury was *never* instructed that the standards for judging the alleged obscenity of the brochure were the standards of San Diego alone.

The majority opinion concludes that the petitioners were not "materially prejudiced". This conclusion is not reached by asserting that the jury was ever in-

structed on the appropriate community standards, but primarily on the basis of a "judicial hunch" that the jury would have reached the same result even if a proper instruction had been given.[1] The record, however, does not support such conclusion, and common experience to which trial judges and trial lawyers can testify also belies such conclusion. The survey which the trial judge excluded from evidence demonstrated that a majority of the persons interviewed in San Diego expressed the view that the brochure should be generally available to the public. Wholly apart from questions of admissibility and weight to be given to this evidence which was excluded, how can it be said that the jury would have reached the same result when there was oral and documentary evidence available, which if believed by the jury, would have resulted in a verdict of not guilty.[2]

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[1]If the distinctions between national standards and other types of standards are "confusing and often gossamer" [Slip Op. 19], then all the more reason for instructions to the jury to be precise as to what is meant by "community standards". The references to some argument of counsel in urging the admission of the San Diego survey and to the statements of one of the petitioners' expert witnesses [Slip Op. 19-20] only indicate that the focus was at all times on "national standards", and as the record makes amply clear, the trial judge rejected petitioners' efforts to present evidence or to even permit the testimony of witnesses for petitioners with respect to the standards of that judicial district.

[2]The majority's attempt to distinguish *Saunders v. Shaw*, 244 U.S.13, appears to misconceive the real issue here. In *Saunders*, this Court reversed the judgment to provide the intervening defendant in that case "an opportunity to controvert the plaintiff's proof" [Slip Op. 20, n. 11]. The majority states that petitioners were given full latitude "in rebutting every factual issue dealt with in the government's case" (*Ibid.*). Keeping in mind, however, that these petitioners are entitled to all the benefits of *Miller* if *ex post facto* considerations are to be avoided, it should be noted that the government never introduced any evidence with respect to the standards of San Diego and petitioners, therefore,

More importantly, petitioners submit that the conclusion drawn that petitioners were not materially prejudiced, because in the opinion of a majority of this Court the jury would have reached the same result, not only does violence to substantial principles of law enunciated by this very Court in the past, but essentially deprives petitioners of the right to a fair trial by a jury. Mr. Justice Frankfurter stated in *Bollenbach v. United States,* 326 U.S.607, 613:

> ". . . The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. *To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks.*" (Emphasis added).

See, *Yates v. United States,* 354 U.S.298, 327 ("We cannot allow a conviction to stand on such an 'equivocal direction to the jury on a basic issue'."); *Wilson v. United States,* 250 F.2d 312, 325 (9 Cir. 1958) ("The decisions are plentiful that an appellate court cannot affirm a conviction erroneously secured on one theory, on the speculation that conviction would have followed if the correct theory had been applied."); *Samuel v. United States,* 169 F.2d 787, 792 (9 Cir. 1948) ("We think giving the wrong law in this case

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never had any opportunity at all to rebut a claim that the material exceeded San Diego standards, and petitioners plainly were denied any opportunity by the trial judge to present any evidence to establish that the material did not offend the standards of tolerance of the San Diego community.

was certainly not less prejudicial than omission to give the law at all."); *Little v. United States*, 73 F.2d 861, 866-867 (10 Cir. 1934) ("But where error occurs which, within the range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it would in fact influence their verdict. So to hold would, as a practical matter, take from a defendant his right to a fair trial."). See also, *New York Times Co. v. Sullivan*, 376 U.S.254, 284; *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 11; *Chapman v. California*, 386 U.S.18, 22-24. As was stated by this Court in *Kotteakos v. United States*, 328 U.S.750, 776:

> "It may be, as the Court of Appeals found, that the evidence concerning each petitioner was so clear that conviction would have been dictated and reversal forbidden, if it had been presented in separate trials for each offense or in one or more substantially similar to the Berger trial in the number of conspiracies and conspirators involved. But whether so or not is neither our problem nor that of the Court of Appeals for this case. That conviction would, or might probably, have resulted in a properly conducted trial is not the criterion of § 269."

Petitioners therefore earnestly urge the Court to grant petitioners the opportunity of a new trial with respect to this basic issue. This Court emphasized again and again in the *Miller* quintet that the accused in federal and state obscenity prosecutions must look to the jury for determination of all the essential "questions of fact", and that the jury must be permitted to draw "on the standards of their community" and not on an al-

leged unrealistic or abstract conception of national standards. In *Hamling* and in *Jenkins*, this Court has emphasized the importance of a jury decision based upon the jurors' knowledge of the community or vicinage from which they come. In *Miller*, this Court acknowledged that the extent of toleration in a single city in the State of Nevada or in the State of New York might be greater than the standards of other particular States or, indeed, the nation. The majority opinion's discussion of the justification for invoking varying community standards in the various federal judicial districts throughout the country is bottomed upon the fact that the standards of these particular communities may turn out to be either more tolerant or less tolerant than the standards of the nation as a whole. It appears plain, it is submitted, that such a substantial question as the evaluation of the extent of community toleration cannot be answered by the guess and conjecture of the judges of an appellate court without any basis for such conclusion other than their subjective judgment. See, *Miller v. California*, 413 U.S.15, fn.3.

The petitioners were tried on the basis of a charge and single theory which focused on the issue of national standards from the beginning to the end of the trial. Efforts to put in evidence with respect to the tolerance of the community from which the jurors were drawn were specifically thwarted by the trial judge. Clearly, had this case been tried under an indictment and a theory charging only violation of the community standards of San Diego, petitioners' presentation of expert witnesses, of documentary evidence, their requests for instructions, and the arguments of their counsel to the jury, would have been entirely different. Obviously, the instructions by the trial judge to the jury, and the

ultimate deliberations by the jury under such instructions, would also have been qualitatively different.

Moreover, the only government witness offered on community standards was the witness Getlein, who plainly on the record had no knowledge or expertise at all with respect to the standards of San Diego [R.T. 2306, 2307-2308, 2319, 2341-2342, 2448, 2451, 2696, 2797-2798]. Thus, the record is devoid of any evidence to affirmatively establish that the standards of San Diego were in any way violated by these petitioners, coupled with the denial of any opportunity for the petitioners to prove that the standards of tolerance of San Diego were not offended by the contents of the brochure.

In short, the verdict in the case herein might very well have been not guilty instead of guilty if the charge under the indictment and the trial of these petitioners had been conducted under proper legal standards and procedures. If all of this does not rise to constitutional error, clearly the judgments of conviction here cannot be said to have been fairly obtained or consistent with "civilized standards of procedure" which underlie the express constitutional prohibitions against arbitrary deprivation of liberty without due process of law and the infliction of cruel and unusual punishment.

4. As a preliminary matter, the majority opinion in the case herein concluded that "any constitutional principle enunciated in *Miller* which would serve to benefit petitioners must be applied in their case" [Slip Op. 12]. It is submitted, however, that while petitioners were assured by the majority opinion that they would receive the benefits of *Miller*, the fact is that they have received none. For example, with respect to the question of whether 18 U.S.C. §1461 was unconstitutionally

vague as applied to petitioners in their prosecution, the majority opinion states that these petitioners have no grounds to complain because of a lack of a previous limiting construction in the light of the brochure here involved. Yet, *Miller* expressly stated that "*no one will be subject to prosecution*" unless material depicts "hard core" sexual conduct "specifically defined by the regulating state law, as written or construed". If the federal obscenity statute at the time of the prosecutions herein did not contain the specific language enunciated in *Miller* and had not previously been construed by this Court to contain such language, then, it is submitted, petitioners were not only entitled to the benefits of "no prosecutions" guaranteed by *Miller*, but have the standing to challenge the validity of the statute as did the petitioners in *Rabe v. Washington*, 405 U.S.313, and *Smith v. Goguen*, 94 S.Ct. 1242.

Moreover, the substantive discussion in the opinion with respect to the vagueness of 18 U.S.C. §1461 and the failure of due process notice in the prosecution of these petitioners appears untenable, it is submitted. The majority states that in *Roth*, 18 U.S.C. §1461 was held to provide ascertainable standards of guilt and therefore did not violate due process rights of the defendants. But *Roth*, and *Memoirs* thereafter, dealt only with community standards, prurient interest, and social value. In *Miller*, this Court rejected those standards as unworkable and ambiguous and held that obscenity statutes will be invalid unless the patently offensive sexual conduct is specifically defined by the law, "as written or construed". Since petitioners are to receive the benefits of *Miller*, it follows that the holding in *Roth* is not sufficient to sustain the federal statute. It must be demonstrated, according to the *Miller* ruling,

that the federal statute contains the specifically proscribed sexual conduct, or it must be demonstrated that the Court has authoritatively construed the federal statute to contain such language.

The majority opinion states that in *United States v. 12 200-ft. Reels of Film*, this Court indicated that it was "prepared to construe" the generic terms in the federal obscenity statute to be limited to the sort of specific "hard core" sexual conduct given as examples in *Miller* [Slip Op. 24]. The majority opinion states: "We *now* so construe the companion provision in 18 U.S.C. §1461, the statute under which this prosecution was brought." [Slip Op. 24] (Emphasis added). If the statute had not been so construed prior to June 24, 1974, then it appears clear that the majority opinion is incorrect in asserting that *Bouie v. City of Columbia*, 378 U.S.347, is not applicable here. In such a case, petitioners are confronted with an "unforeseeable and retroactive judicial expansion of narrow and precise statutory language" [Slip Op. 25-26].

The *ex post facto* application of the statute in this case cannot, it is submitted, be saved by the conclusion that the federal obscenity statute had prior to *Miller* been "authoritatively construed in a manner consistent with *Miller*" [Slip Op. 22]. Aside from the multifold per curiam reversals based on *Redrup*, every definitive majority opinion and judgment of this Court since *Roth*, and up to *Kois v. Wisconsin*, 408 U.S.229, held the books, magazines, films and other expression involved in those cases to be not obscene and entitled to constitutional protection.[3] It is submitted that it is

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[3]In *Ginzberg*, the Court assumed for purposes of argument that the material itself was not obscene.

anomalous to assert under such circumstances that the federal obscenity statute has previously been "authoritatively construed" to include the specific and detailed sexual conduct outlined in *Miller*. The quotation from the opinion of Mr. Justice Harlan in *Manual Enterprises, Inc. v. Day* [Slip Op. 22] can hardly be equated with the "specific prerequisites" in *Miller*. It should be noted that Mr. Justice Harlan emphasized in *Manual* that the relevant "community" in federal obscenity prosecutions, as distinguished from state, should be a "national standard" (370 U.S. at 488). Moreover, the portrayals in the magazines involved in *Manual* were held to be nonobscene, despite the candid portrayal of the genitals of nude male models (370 U.S. at 489, n.3). None of this would appear to justify a conclusion that *Manual* represents an "authoritative construction" of the federal statute akin to *Miller*. Nor is the *Miller* attempt to avoid the vagueness issue by insistence upon language of specific sexual conduct met by the assertion that such language in *Manual* as "unacceptable under current community *mores*", or "obnoxiously debasing portrayals of sex", is an equivalent construction. The fact is that the language in *Manual* is so vague and ambiguous, and so entirely inconsistent with the specific language detailed in *Miller*, that the federal statute could not be sustained under the very rulings of this Court. *Smith v. Goguen*, 94 S.Ct.1242; *Lewis v. New Orleans*, 94 S.Ct.970; *Plummer v. City of Columbus*, 94 S.Ct.17; *Gooding v. Wilson*, 405 U.S.518; *Papachristou v. City of Jacksonville*, 405 U.S. 156.

Finally, it should be noted that even if the federal obscenity statute had been authoritatively construed prior to *Miller* to include the specific sexual conduct

there described, the jury here was never instructed that the statute has been so construed. The only instructions to the jury were basically the *Memoirs* standards. It is fundamental that a jury must be instructed as to the applicable law involved if a jury verdict is to be deemed consistent with the requirements of due process. *Bollenbach v. United States*, 326 U.S.607; *Samuel v. United States*, 169 F.2d 787, 792 (9 Cir. 1948).

5. The majority opinion states that the *Memoirs* "social value" formulation was not rejected in *Miller* because of its vagueness, but merely to ease the burden of the prosecutor in obscenity prosecutions [Slip Op. 26]. The conclusion of the majority is that since *Miller* permits the imposition of a lesser burden on the prosecution on the issue of social value than did *Memoirs*, and since the jury convicted petitioners on the basis of an instruction based on *Memoirs*, petitioners can derive "no benefit from the revision of that test in *Miller*" [Slip Op. 26-27]. However, aside from the reiteration in *Miller* that the concepts of "social value" and "social importance" were ambiguous and rejected as a constitutional standard, it is submitted by petitioners that the majority opinion overlooks the more basic question involved in this phase of the test for judging obscenity. In *Roth*, this Court held that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance". In *Miller*, this underlying concept which had been the justification for excluding "obscenity" from the protection of the First Amendment was rejected. Instead, the Court in *Miller* justified the exclusion of alleged obscene material from constitutional protection upon the ground that such material does "not have serious literary, artistic, political, or sci-

entific value". If petitioners are to have all the benefits of *Miller*, then it is submitted that a jury in San Diego should have the first opportunity, by proper instructions, to determine whether or not the contents of this brochure, which was critical of the President for his rejection of the Commission Report, did not in fact have serious political value. It is neither logically or empirically correct to assert that the test of "utterly without social value" necessarily encompasses a test of "lacking serious literary, artistic, political, or scientific value". Indeed, a Justice of the United States Supreme Court has held, in effect, that the brochure here involved has serious political, literary and scientific value. See the dissenting opinion of Mr. Justice Douglas [Slip Op. 1-2]. A jury, properly instructed under appropriate standards, might agree.

In this connection, the majority concludes that the jury was not bound to accept the opinion of any expert whose testimony was introduced at the trial, and that the jury's determination that the brochure was obscene "was supported by the evidence and consistent with the *Memoirs* formulation of obscenity" [Slip Op. 10]. The majority opinion notes that the court of appeals also found that the evidence was sufficient under the *Roth-Memoirs* test [Slip Op. 7, fn. 7]. But the evidence which the court below and this Court find to be sufficient was based solely on "hypothetical" and "futile" standards. The only evidence offered on standards, for example, was on national standards, and the government's witness was not qualified to even testify with respect to the local standards of San Diego. Obviously, the court below could not know at the time it originally affirmed the judgments of conviction that the national standards and utterly without redeeming social

value tests were to be subsequently rejected in *Miller*. But if, as the majority states in the opinion here, petitioners are to be given all the benefits of *Miller*, then clearly the judgments of conviction are not supported by evidence presented to a jury with respect to elements of the offense which the majority now finds essential, to wit, lack of literary, artistic, political or scientific value and standards of the district from which the jury is drawn.

B

1. In the light of the foregoing, petitioners submit that considerations of fairness which underlie this Court's supervisory authority over the administration of criminal justice in the federal courts warrant reversal and remand in the case herein. There are, however, additional grounds for invoking this Court's supervisory jurisdiction. It appears that in some instances the record and the applicable law have been overlooked in the majority opinion, and in other instances it is conceded that additional errors occurred at the trial. The concession that there has been more than one error is of significance. It has been held that errors, when considered in toto, may accumulate such a cumulative prejudice that they require a reversal. *Gordon v. United States*, 344 U.S.414, 422-423; *Crawford v. United States*, 212 U.S.183; *Olender v. United States*, 210 F. 2d 795, 808-809 (9 Cir. 1954). Petitioners submit that fairness and justice require modification of the harsh judgments of conviction herein, not only based upon the foregoing analysis of the first subdivision of the majority opinion [Slip Op. 7-27], but also an analysis of the remainder of the discussion in the majority opinion.

The majority opinion sustains the sufficiency of the indictment based upon such decisions as *United States v. Carll*, 105 U.S.611, and *United States v. Hess*, 124 U.S.483, both of which cases held the indictments to be insufficient. *United States v. Russell*, 369 U.S.749, is distinguished because obscenity is "a legal term of art", and "is a term sufficiently definite in legal meaning to give a defendant notice of the charge against him" [Slip Op. 27-28]. In short, the use of the term "obscene" assumedly involves similar standards in an indictment under *Roth*, under *Memoirs*, under *Miller*, and under *Hamling*, and is purportedly sufficient to advise each of the accused under such circumstances of the charges made against him. Yet, in the trial herein, these petitioners were advised by a bill of particulars that the word "obscene" meant only that the brochure exceeded contemporary community standards in the nation as a whole, appealed to the prurient interest of the average person, and was utterly without redeeming social value or importance. These petitioners, who have been told by the majority opinion that they are entitled to the benefits of *Miller*, were never advised that the brochure exceeded the contemporary standards of San Diego; were never advised that the charge against them included a charge that the material was designed and intended to appeal to the prurient interest of a specifically defined deviant group; were never advised that the brochure lacked serious literary, artistic, political, or scientific value; and were never advised by statute, indictment or bill of particulars with respect to the specifically defined sexual conduct delineated in *Miller*.

If "the various component parts of the constitutional definition of obscenity need not be alleged in the indict-

ment" [Slip Op. 28-29], it must be remembered that in this case the bill of particulars of the indictment by the government did set forth the alleged essential elements of obscenity, and such elements were found in *Miller* to be hypothetical and futile. In this case, the government descended to the particular, and the particulars rendered the indictment patently defective under the rulings of this Court in *Miller*. In similar fashion, the District Court and the Court of Appeals may have upheld the sufficiency of the indictment [Slip Op. 29, fn. 12], but the indictment was only upheld on the basis of standards which this Court in *Miller* held to be unworkable and incapable of objective measurement. The sufficiency of the indictment here, therefore, is as much in question as the sufficiency of the indictment in *Orito*, which led to remand by the Court.

It is difficult to conclude that petitioners were "adequately" informed of the charges made against them. It is perhaps more accurate to say that petitioners were convicted on a charge never made and a theory never tried.

In *Grunewald v. United States*, 353 U.S.391, 404, it was stated: "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." The obliteration by the majority opinion [Slip Op. 34] of the heavier requirement of proof of *scienter* in conspiracy prosecutions, as distinguished from alleged substantive violations, opens up avenues of prejudice to innocent defendants and is inconsistent with fair law enforcement. There is danger to all those engaged in the circulation of the

press when persons who combine to engage in normal business activities find their joint pursuits boosted into a federal conspiracy prosecution.

The majority opinion concedes that a defendant in an obscenity prosecution is entitled to adduce "relevant, competent evidence bearing on the issues to be tried" [Slip Op. 35]. It is stated, however, that "the availability of similar materials on the newsstands of the community does not automatically make them admissible" [Slip Op. 35]. The majority opinion appears to have overlooked that the evidence showed more than mere availability of the offered evidence. The fact is that the experts testified that the materials on the newsstands of the community found a reasonable degree of acceptance in the community [J.A. 166-167; R.T. 3577-3579; 3922-3947]. Although it is conceded that some of the materials offered by petitioners were "clearly relevant" [Slip Op. 37], still it is stated that the district court had the discretion to exclude such evidence on the ground that it would tend to create "more confusion than enlightenment in the minds of the jury" [Slip Op. 37]. There is nothing in the record to indicate how the admission of clearly relevant evidence in the case herein would have confused the jury, and the Court overlooks that all evidence other than that of the experts was excluded in toto as an alternative to the introduction of expert witnesses, and the statement made with respect to "confusion" was a mere general ground offered by the trial judge without any particularization (J.A. 157-158). That the trial judge "expressed willingness to permit the same material to be treated in the testimony of expert witnesses" [Slip Op. 37] overlooks the fact that the material which the experts were discussing before the jury was never shown

to the jury. On the one hand, the jury was instructed by the trial judge that they could disregard the testimony of the experts, and on the other hand, they were not permitted to see relevant evidence which might have led the jury to accept testimony of petitioners' experts. It should also be added that while the trial judge permitted "four expert witnesses called by petitioners to testify extensively concerning the relevant community standards" [Slip Op. 35], still the only relevant community standard which the trial judge permitted the experts to testify about was the national standard, abandoned in *Miller*.

On the issue of "prurient interest" [Slip Op. 37-39], the majority opinion appears to overlook the record in salient respects. These petitioners were never charged in the indictment with preparing a brochure "designed for and primarily disseminated to a clearly defined deviant sexual group". It was never charged that the brochure appealed to the prurient interest of some specifically defined deviant group. The government's bill of particulars specifically asserted that the charge in the indictment was only that the brochure herein allegedly appealed to the prurient interest of the average person (J.A. 45-46). The trial judge not only permitted evidence to come into the record in an attempt to establish that the brochure appealed to the prurient interest of sexually deviant groups, but also instructed the jury that on the one hand, the material must be measured "by its appeal to the average adult", but on the other hand, the prurient appeal requirement may be assessed "in terms of sexual interest of the intended or probable recipient group. This group must be a clearly defined sexual deviant group . . . I suppose one clearly defined would be homosexuals" (J.A. 239-240). In-

deed, the trial judge, preliminarily to the aforesaid statements, instructed the jury specifically that the appeal to prurient interest must be measured either by the average or ordinary adult "or by a clearly defined deviant group" (J.A. 239).

The majority opinion misconceives the question presented herein. The issue is not whether a general finding that material appeals to a prurient interest in sex is precluded when some of the material appeals to the prurient interest of the average person and some appeals to the prurient interest of sexual deviants [Slip Op. 38]. The fundamental issue here, which has not been answered by the majority opinion, is how the judgments of conviction can be sustained when the trial court permitted the jury to convict petitioners under a *Mishkin* standard, which was never charged in the indictment and specifically disavowed in the bill of particulars of the indictment, which was never established by evidence (since there was no evidence that these petitioners designed or intended the material for some deviant group), and which was given to the jury as an alternative standard for their consideration. The majority opinion states that the jury was instructed that the materials must appear generally to a prurient interest in sex, but overlooks that the jury was specifically instructed that they could return a verdict of guilt even if they intuited that the brochure appealed only to a deviant group. See, *Stromberg v. California,* 283 U.S.359, 367-368.

It should also be observed in this connection that the majority opinion concedes another error committed during the trial which adds to the total of cumulated errors in this case. It was conceded by the Court of

Appeals, and the majority opinion agrees, that the evidence offered with respect to the alleged prurient appeal to a sexually deviant group "was at variance with the Government's answer to the Bill of Particulars" [Slip Op. 37, fn. 17].

The majority opinion devotes considerable space to a discussion of Rule 30 of the Federal Rules of Criminal Procedure [Slip Op. 41-45]. The upshot of the discussion is marked by the opinion's conclusion that, "we agree with the Court of Appeals that the District Court erred in refusing to permit such objections to be made out of the presence of the jury" [Slip Op. 42]. Again, however, the Court concludes that such error is not material, and reversal is not required [Slip Op. 42]. While conceding that the ultimate way to assure the goal attempted by the 1966 amendment to Rule 30 "is to comply with the Rule" [Slip Op. 44], the majority opinion concludes that a strict approach requiring reversal would be unduly mechanical and "inconsistent with interpretation *in pari materia* of Rule 30 and other relevant provisions of the Federal Rules of Criminal Procedure" [Slip Op. 44-45]. Yet, only five years ago, this Court gave quite a different interpretation of another Rule of the Rules of Criminal Procedure, to wit, Rule 11, which governs the procedure for acceptance of guilty pleas in federal criminal trials. Rule 11 provides, among other things, that the court may not accept the plea without first addressing the defendant personally and determining that the plea is made voluntarily and with understanding of the nature of the charge and the consequences of the plea. In *McCarthy v. United States,* 394 U.S.459, the defendant had pleaded guilty to an indictment charging violations of the Internal Revenue Code. His counsel at the time of

the plea told the court that he had advised the defendant of the consequences of the plea. The court also asked the defendant whether he understood that his plea meant waiver of a jury trial and the possibility of a sentence of five years' imprisonment. Subsequent colloquies at the time of the sentencing hearing also demonstrated that the judge had satisfied himself by examination of the presentence report that the plea had a factual basis. Nevertheless, and despite all this, this Court reversed the judgment of the Court of Appeals and remanded the case to afford the petitioner an opportunity to plead once again, all of this because the court initially had not *first* addressed the defendant personally. This Court stated:

> "We thus conclude that *prejudice inheres* in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew not only will insure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate." (394 U.S. at 471-472) (Emphasis added).

The majority opinion has declined to afford petitioners the shelter of Rule 30, despite the plain purpose of the 1966 amendment. The majority opinion finds "no

prejudice" to petitioners, apparently because the record does not indicate that the discussion was heard by the jury (nor does it indicate that it was not) and because the trial judge had indicated his rulings with respect to the instructions requested by counsel. As to the court's prior rulings, the record is plain that there was no satisfactory indication prior to the time of the giving of the instructions to the jury as to what the trial judge had decided. Many of the instructions remained unsettled [R.T. 4442-4443, 4457, 4471, 4479, 4487, 4492, 4495, 4502, 4504]. Moreover, the achievement of the objective of Rule 30 is in no way related to whether or not the jury hears counsel making his objections to the instructions of the judge. The amendment was intended to allow counsel for an accused full opportunity to object outside of the presence of the jury in order to avoid the concededly psychological pressures of low-toned bench conferences which lead to truncated presentations and understandings. Indeed, in *Schartner*, to which the majority opinion points, the court rejected the notion that failure to obey Rule 30 is "harmless" and stated that there should be reversal for noncompliance "even where the defendant cannot affirmatively prove prejudice" (426 F.2d at 479). Pressure upon jurors who view defense counsel in a posture of apparent antagonism toward a trial judge are clearly imperceptible, and it is always difficult for a criminal defendant to prove their presence. It is for this very reason that the amendment to Rule 30 was enacted.

Finally, regarding the selection of the trial jury, petitioners' claims with respect to the limitations on *voir dire* questions and the improper constitution of the jury were rejected [Slip Op. 46-50]. The Court, in the *Miller*, *Hamling* and *Jenkins* opinions, has placed great

stress on the importance of the jury in obscenity prosecutions. Yet, the attempt to obtain a jury which would at least be free of prejudice in this highly emotional area was effectively blocked by the trial judge during *voir dire*. The demands of due process may require not only inquiry by a judge into possible racial prejudices, but also with respect to deep and irrational prejudices against the depiction or representation of sex or nudity. Assuming, as the majority opinion does, that there is a cognizable class of citizens between the ages of 18 and 24, it does appear to be a manifest abuse of discretion not to have granted counsel a one-month extension to obtain a jury panel which would have at least contained the names of persons 21 years of age and over.

C.

Petitioners respectfully submit, in light of all the foregoing, that the petition for rehearing should be granted and the judgment of affirmance modified to provide for reversal and remand. Members of this Court have frequently stated that subjective aversion to the particular conduct of an accused should play no part in the determination of the constitutional and legal issues before the Court. As Mr. Justice Brandeis once stated, "we must be ever on our guard, lest we erect our prejudices into legal principles". Freund, *The Supreme Court of the United States,* 124 (Paperback ed. 1961). This Court has manifested its determination to place attachment to the Constitution above any purely personal attitudes by the repeated exercise of this Court's supervisory jurisdiction over the administration of criminal justice in the federal courts. Time and again this Court has insisted upon the unbiased and carefully delineated application of constitutional and legal principles, as

well as fairness in trial procedures. Justice must satisfy the appearance of justice if the community is to have faith and confidence in the law and our institutions.

Conclusion.

In *Miller, Paris Adult Thearte I, 12 200-ft. Reels, Orito* and *Kaplan,* all of these federal and state judgments were vacated and remanded. Since June 21, 1973, some seventy-five judgments have been vacated and remanded in the light of the original quintet of decisions. Moreover, virtually all of the aforesaid judgments imposed far lesser sanctions than the four and three year terms of imprisonment imposed in the case herein. Fairness would dictate, it is submitted, that under the circumstances of this case the petitioners should be afforded, as a minimum, the opportunity for a new trial based on the principles, definitions and procedures enunciated by this Court in *Miller* and *Hamling.*

For all the foregoing reasons, the Petition for Rehearing should be granted.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Petitioners William L. Hamling, Reed Enterprises, Inc. and Library Service, Inc.,

SAM ROSENWEIN,
Attorney for Petitioners Earl Kemp, Shirley R. Wright and David L. Thomas.

LOUIS S. KATZ,
Of Counsel.

Attorneys' Certificate of Good Faith.

The undersigned Stanley Fleishman, attorney for petitioners William L. Hamling, Reed Enterprises, Inc. and Library Service, Inc., hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment the grounds of said petition are well taken and in conformance with the Court's Rules, and that said petition for rehearing is not interposed for delay.

STANLEY FLEISHMAN,
Attorney for Petitioners William L. Hamling, Reed Enterprises, Inc. and Library Service, Inc.

The undersigned Sam Rosenwein, attorney for petitioners Earl Kemp, Shirley R. Wright and David L. Thomas, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment the grounds of said petition are well taken and in conformance with the Court's Rules, and that said petition for rehearing is not interposed for delay.

SAM ROSENWEIN,
Attorney for Petitioners Earl Kemp, Shirley R. Wright and David L. Thomas.